

DOCTORATE IN CRIMINAL JUSTICE

University of Cape Town, Faculty of Law

Compensation for victims of sexual violence in South Africa:
A human rights approach to remedial criminal compensation provisions

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DECLARATION

I declare that the thesis for the degree of Doctor of Philosophy at the University of Cape Town hereby submitted, has not been previously submitted for a degree at this or any other university, that it is my work in design and execution, and that all the materials contained herein have been duly acknowledged.

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ABSTRACT

The author questioned why state attorneys, prosecutors and magistrates/judges in South Africa rarely review the compensation concerns of sexual violence complainants and witnesses in criminal sentencing matters, and in quasi-criminal civil forfeiture proceedings, as is frequently done for other classes of complainants (namely, commercial crime complainants and victims of violent crime in general). A conclusion was reached, after conducting extensive research for this thesis, that offender and state compensation processes were sparingly utilized in cases of sexual violence, in part, due to institutional biases that resulted in discrimination. The above finding was substantiated by way of twenty-seven (27) interviews with criminal justice role-players, eight (8) court file case studies and forty-seven (47) victim surveys.

The above subject matter is important because failures by criminal justice state role-players to review the compensation concerns of sexual violence victims, on account of biases, causes real harm to these vulnerable complainants. For example, research in this thesis confirmed that state and offender compensation can assist sexual violence complainants with their cultural obligations, court appearances and post-assault health expenses and to pre-empt compensation reviews on account of biases disrupts victims' post assault recoveries. Further, compensation can assist sexual violence complainants with security related expenses, including relocation costs, so as to avoid repeated victimization. Biases should therefore not obstruct compensation reviews that can ensure the safe movement of women out of abusive environments. Finally, the lack of compensation reviews in sexual violence prosecutions, on account of biases, offends important Constitutional precepts in relation to the security of persons and the right to equality and non-discrimination.

With regards to the biases held by criminal justice role-players, research in this thesis confirmed that many state attorneys, prosecutors and magistrates were not assisting complainants with their compensation concerns because they assumed that sexual violence victims did not want or need compensation, and that they did not have quantifiable losses. Research in this thesis rebutted these unfounded generalizations and the surveys confirmed that many victims would be greatly assisted if they received nominal amounts of compensation and they would welcome financial assistance from offenders or the state. Furthermore research in this thesis confirmed that victims have numerous quantifiable economic losses relating to their court appearances, and post assault care, and that prosecutors, state attorneys and the judiciary could easily assist victims of sexual violence with their compensatory concerns, within criminal sentencing dispositions, and forfeiture proceedings, as was frequently done in commercial crime matters.

This thesis proposes three solutions to address role-players' biases which are preventing the provision of compensation to victims of sexual violence within criminal and quasi criminal proceedings.

First, it is proposed that prosecutorial and judicial education is required, to ensure that compensation is fully canvassed within criminal and quasi-criminal court proceedings. Furthermore, legal education could inform role-players on the heads of damages victims of sexual violence generally encounter and how to quantify these losses within compensatory criminal and quasi-criminal processes.

Second, it is argued that when offenders are impecunious the Department of Social Development's Social Relief of Distress Grant and court witness stipends should be widely distributed to economically vulnerable sexual violence victims, and prosecutors should assist complainant-witnesses with referral information and supporting letters. Currently, as research in this thesis confirmed, prosecutors rarely assist victims with these grant/stipend applications or make them aware of these important sources of financial assistance.

Third, it is proposed that prosecutors should thoroughly review indigenous customary compensation arrangements, when they are made aware of these arrangements when prosecuting cases, to ensure that the arrangements in fact benefit the complainant. Prosecutorial and judicial oversight is necessary to ensure victims are not coerced into customary patriarchal arrangements and that compensation is provided to victims rather than directed to male figure heads that often negotiate these settlements.

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A NOTE ON PUBLISHED WORKS

This thesis incorporates interview findings and quotes from an article published prior to the submission of this thesis. The article in question is: Bryant Greenbaum 'An elaboration of the themes and contentions in Mmatshilo Motsei's book *The Kanga and the Kangaroo Court, Reflections on the Rape Trial of Jacob Zuma*' 21 (2008) 1 *South African Journal of Criminal Justice* 81 to 98.

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Victim Survey template and comprehensive survey findings

GENERAL ABBREVIATIONS AND ACRONYMS

| | |
|-------|---|
| AFU | Asset Forfeiture Unit |
| AU | African Union |
| CARA | Criminal Asset Recovery Account |
| CEDAW | Convention on the Elimination of All Forms of Discrimination Against women |
| CSR | Correctional Supervision Report |
| CWS | Court Witness Stipends |
| DOJCD | Department of Justice and Constitutional Development |
| NICRO | National Institute of Crime Prevention and Reintegration of Offenders |
| NPA | National Prosecuting Authority |
| SADC | Southern African Development Community |
| SALRC | South African Law Reform Commission |
| SAPS | South African Police Service |
| SANCO | South African National Civics Organization |
| SASSA | South African Social Security Agency |
| SOCA | Sexual Offences and Community Affairs Unit |
| SRDG | Social Relief of Distress Grant |
| TCC | Thuthuzela Care Centre |
| UNODC | United Nations Office on Drugs and Crime |
| VIR | Victim Impact Report |

LIST OF SOUTH AFRICAN STATUTES

| | |
|--------------|---|
| Constitution | Constitution of the Republic of South Africa, 1996 |
| CCA | Child Care Act 74 of 1983 |
| CJA | Child Justice Act 75 of 2008 |
| CSA | Correctional Services Act 111 of 1998 |
| CLAA | Criminal Law (Sentencing) Amendment Act 38 of 2007 |
| SOA | Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 |
| CPA | Criminal Procedure Act 51 of 1977 and Regulation 391 |
| GLAA | General Law Amendment Act (Minimum Sentences) 105 of 1977 |
| PFVA | Prevention of Family Violence Act 133 of 1993 |
| POCA | Prevention of Organized Crime Act 121 of 1998 |
| SAA | Social Assistance Act 13 of 2004 and Regulation 898 |

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LIST OF CASES

South African

Reported

- *Director of Public Prosecutions, North Gauteng v Thabethe* 2011 (2) SACR 567 (SCA)
- *Harksen v Lane NO and Others* 1997 (11) BCLR 1489 (CC)
- *Jordan and Others v The State* 2002 (11) BCLR 1117 (CC)
- *Minister of Finance v Van Heerden* 2004 (11) BCLR 1125 (CC)
- *National Director of Public Prosecutions v Braun and Another* 2007 (1) SACR 326 (WCHC)
- *National Director of Public Prosecutions v Braun and Another* 2007 (1) SACR 556 (WCHC)
- *National Director of Public Prosecutions v Van Der Merwe and Another* 2011 (2) SACR 188 (WCHC)
- *National Director of Public Prosecutions v Geyser* (160/2007) [2008] ZASCA 15 (25 March 2008)
- *Prinsloo v Van der Linde* 1997 (6) BCLR 759 (CC)
- *S v BL* 2013 (1) SACR 140 (NGHC)
- *S v Baloyi* 2000 (1) BCLR 86 (CC)
- *S v CS* 2012 (1) SACR 595 (ECHC)
- *S v FM* 2013 (1) SACR 57 (NGHC)
- *S v Gani No* 2012 (2) SACR 468 (SGHC)
- *S v Kotze* 1986 4 SA 241 (C)
- *S v L* 2012 (2) SACR 399 (WCHC)
- *S v LM* 2013 (1) SACR 188 (WCHC)
- *S v M* 2007 (2) SACR 60 (WCHC)
- *S v MK* 2012 (2) SACR 533 (SGHC)
- *S v Mabena* 2012 (2) SACR 287 (NGHC)
- *S v Magkise* 1973 2 SA 493 (O)
- *S v Maluleke* 2008 (1) SACR 49 (T)
- *S v Marais* 2009 (1) SACR 299 (T)
- *S v RS* 2012 (2) SACR 160 (WCHC)
- *S v Salzwedel and Others* 2000 (1) SA 786 (SCA)
- *S v Stanley* 1996 2 SACR 570 (A)
- *S v Tabethe* 2009 (2) SACR 62 (NGHC)
- *S v Tshondeni* 1971 4 SA 79 (T)
- *S v Van Wyk* 2000 (1) SACR 45 (C)
- *S v Z and 23 Similar Cases* 2004 (1) SACR 400 (E)
- *S v Zinn* 1969 (2) SA 537 (A)
- *S v Zuma* 2006 (2) SACR 191 (W)
- *Van Eeden v Minister of Safety and Security* 2003 (1) SA 389 (SCA)
- *Volks v Robinson NO* 2005 (5) BCLR 446 (CC)

Unreported

- Arbitration Award (3 October 2012), Arbitrator: Urd Mansingh, *In re: The Expedited Arbitration, Restorative Justice Centre (Claimant) and Gauteng MEC For Agriculture, Rural Development and Social Development (First Defendant)*
- *Esme van Zijl and Imker Marais Hoogenhout* (25 May 2006) Court Case Number 9253/99 (WCHC)
- *S v Hoosain Mohamed* (28 October 2003) Court Case Number 35259/03 (WCHC)
- SS and The presiding officer of the children's court: district of Krugersdorp and others (29 August 2012) Appeal Court Case Number: A3056/11 (SGHC)

Non-South African Jurisdictions and International

- *Criminal Case No.39 of 2005* (22 June 2007) (Tanzanian Court of Appeal)
- *Delhi Domestic Working Women's Forum v Union of India and Others* 1 SCC (1995) (Supreme Court of India)
- *Director of Civil Forfeiture v Ladha* (unreported) (25 August 2011) (Supreme Court of British Columbia)
- *Jane Doe v Board of Commissioners of Police* 39 Ontario Reports (3d) 487 (1989) (Ontario Superior Court)
- *M.C. v. Bulgaria* (2005) 40 E.H.R.R. 20 (European Court of Human Rights)
- *Queen v Robert Garner* (unreported) (26 April 1999) (Australian County Court, Melbourne)

-PART ONE-

**INTRODUCTION AND
METHODOLOGY**

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-CHAPTER ONE-

RESEARCH ARGUMENT, OVERVIEWS, EXCLUSIONS AND METHODOLOGY

1 Research argument

The author sought to prove that South African victims of 'sexual violence' ¹, who are mostly females ², rarely have their compensatory concerns addressed by prosecutors, state attorneys, and judges ³, within criminal sentencing dispositions, and quasi-criminal civil forfeiture proceedings, partly due to gender biases that have been institutionalized within the judiciary and the National Prosecuting Authority (NPA) and this in turn results in unfair gender discrimination.

It is important to clarify two matters regarding this overall argument.

First, this thesis focuses on this one important impediment to compensation – namely biases. With this in mind, the United Nations Office on Drugs and Crime (UNODC), in *Gender in the Criminal Justice System Assessment Tool*, confirms that “a fair, effective and representative criminal justice system is one that is... gender-responsive and works to identify and address gender biases.” ⁴ The author agrees with this UNODC assessment along with the importance of

¹ The Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (SOA) includes many crimes of a sexual nature and for the purposes of this thesis all of the enumerated offences in this Act constitute sexual violence. Furthermore, the World Health Organization in their *World Report on Violence and Health* (2002:149), defines 'sexual violence' as follows: 'any sexual act, attempt to obtain in a sexual act, unwanted sexual comment or advances, or acts to traffic, or otherwise directed, against a person's sexuality using coercion, by any person regardless of their relationship to the victim, in any setting, including but not limited to home and work.'

² Most sexual violence victims in South Africa are female. In this regard, Statistics South Africa's *Quantitative Research Findings on Rape in South Africa* (2000:2), confirmed that 'victims of rape tend to be younger women, aged 16-25 years.'

³ For the purposes of this thesis the term 'judge(s)' refers to both judge(s) and magistrate(s) unless specified otherwise.

⁴ United Nations Office on Drugs and Crime (UNODC) (2010: 1).

reviewing biases as a stand-alone concern. This is so because biases affect not only the decision making patterns of individual prosecutors and judges, but in addition, biases also affect the decisions of institutional role-players, like the NPA, when they deal with policy formation, human and financial resource allocations and continuing legal education priorities.⁵

Second, it is important to note, as confirmed by Joan Williams in *Unbending Gender*, that “much discrimination, far from being intentional, is not even conscious [as] women are systematically disadvantaged by shared expectations built into established patterns of behavior that become institutionalized as simply the way things are done [and therefore] we need to shift from a model that depicts discrimination as caused by a bad actor, who needs to be removed, to an analysis of established patterns of behavior that operate to disadvantage women in subtle but systematic ways without any one person being at fault.”⁶ With this in mind, the biased decision making “patterns” that are reviewed in this thesis are not based on blatant misogynistic notions but rather they stem from prejudicial misconceptions about sexual violence victims and their gendered post assault financial losses. Moreover, the biased decision making “patterns” reviewed in this thesis often occur in discretionary spheres (such as sentencing and forfeiture proceedings). With this in mind, by way of discretion, role-players often cite other priorities and considerations that must be attended to, when they make adverse gender decisions, when biases are partially involved.

⁵ UNODC (2010: 1 and 2) also confirm that gender biases “may promote discrimination, limit access to justice and prevent women’s full participation in the criminal justice system... [and] access to justice for women can be blocked for many reasons including: a lack of knowledge regarding legal rights and how to access the justice system; lack of financial resources; fear; corruption; language barriers; discriminatory practices of police and/or judicial personnel.”

Also note that Albertyn and Goldblatt (2012:35-7) confirm that courts often must determine “when an impugned differentiation (or failure to differentiate) amounts to a violation of the equality right [in the Constitution]” and in doing so the courts must also “negotiate the boundaries of institutional competence.”

⁶ Williams (2000:253).

Regarding the definitions that will be applied throughout this thesis, which are comprehensively reviewed in subsection 1.2, 'gender bias' is a process in which irrational stereotypes and unfounded prejudicial assumptions are relied upon by state role-players to justify preferential treatment for certain classes of victims (for example commercial crime victims as compared to sexual violence victims) or alternatively to justify the lack of prosecutorial and court based services available to female victims in the criminal justice system.⁷

Furthermore, 'gender discrimination', an outcome of prejudicial biases, occurs when state role-players in the criminal justice system exacerbate the vulnerabilities⁸ of sexual violence victims, who are mostly female, by not properly addressing gender differentiations.

Moving on to the compensation processes that are reviewed in this thesis, firstly compensatory provisions in South Africa's Criminal Procedure Act (CPA)⁹ and Correctional Services Act (CSA)¹⁰ are studied in relation to sentencing proceedings. Secondly, compensatory provisions in the Prevention of Organized

⁷ Williams in *Unbending Gender* (2000:205-208) confirms that:

"...treating women the same can leave women vulnerable...but treating differently can also leave them vulnerable as well... [therefore] feminist should recognize a small realm of "formal equality" where men and women should be treated the same, along with a much larger realm of "substantive equality" where man and women should be treated differently...[this is so because] treating women and men the same will backfire unless ["masculine norms"] are first dismantled. Otherwise women will be further disadvantaged when they are treated the same as men in the face of norms that favor men because they are designed around men's bodies or life patterns."

Note that a full review of the terms formal and substantive equality takes place in subsection 1.2.

⁸ Albertyn and Goldblatt (2012: 35-43) confirms, while citing *Prinsloo v Van der Linde* 1997 (6) BCLR 759 (CC) at paragraph 31, that "while discrimination itself contains a negative or pejorative connotation entailing some harm based on difference, unfair discrimination goes further in deepening or worsening existing disadvantage."

⁹ Act 51 of 1977 (CPA); see subsection 1.1 and 5.1 for a review of the compensatory sections in this Act.

¹⁰ Act 111 of 1998 (CSA); see subsection 1.1 and 5.1 for a review of the compensatory sections in this Act.

Crime Act (POCA) ¹¹ are reviewed in relation to civil forfeiture proceedings. Thirdly, this thesis reviews compensation derived from court supervised customary arrangements ¹², as well as extra-judicial compensatory processes, namely court stipends and social grants for undue hardship. ¹³ Finally, the reader should be aware that this thesis does not review all prescribed compensatory processes that can be employed in criminal proceedings, such as those in the Child Justice Act (CJA) ¹⁴, which are symbolic in nature, and those in Section 300 of the CPA, which are for property losses only. In this regard, comprehensive reasons why certain areas are excluded in this thesis are noted in subsection 1.3.

The compensatory processes that have been chosen for review in this thesis are important to sexual violence complainants as they can provide victims with money to attend post assault medical and counseling services. ¹⁵ In addition, with regard to crime prevention benefits, studies also indicate that victim compensation can decrease attrition rates in criminal court matters as victims are better equipped to cooperate with prosecutors when compensation is provided to

¹¹ Act 121 of 1998 (POCA); see subsection 1.1 and 5.2 for a review of the compensatory sections in this Act.

¹² See subsections 1.1 and 5.4, and Chapter 6, for a review of customary compensatory African traditions in relation to sexual violence matters.

¹³ A review of the Department of Social Developments' Social Relief of Distress Grant (SRDG) and the Department of Justice and Constitutional Development's (DOJCD) court witness stipends (CWS) takes place in subsections 1.1 and 5.3.

¹⁴ Act 75 of 2008 (CJA) see subsection 1.3 for a complete listing of the compensatory sections in this Act.

¹⁵ Victims incur many types of financial losses, including direct and indirect economic losses. With regard to direct losses the following categories need to be addressed by victims, post assault: costs associated with attending court or medical treatment, lost wages, cost of emergency and non-emergency hospital visits and costs related to pregnancies. With regards to indirect costs, important matters that need to be addressed include educational/career deprivations and mental health concerns.

Also see subsection 8.3 and Appendix 3 for an overview of the types of post assault economic losses noted by participants who completed a survey for this thesis, along with international literature confirming common post assault expenses for victims of sexual violence.

assist victims with their court related expenses (including childcare costs and transportation expenses).¹⁶

Further, it is submitted that these compensatory criminal processes, alongside remedial emergency social grants, can reduce repeat victimization as many sexual violence complainants can remove themselves from abusive environments, or increase their security, with the assistance of state or offender compensation payments.¹⁷

With the above benefits in mind, this thesis is premised on the widely-held view¹⁸ that victim compensation is a desirable feature of a criminal justice system, particularly in the case of victims of sexual violence.

To prove the thesis hypothesis regarding the existence of gender bias in the South African criminal justice system, in relation to the compensatory concerns of sexual violence victims, three (3) overarching conclusions were reached based on the research conducted. These conclusions confirm that biases partly contributed to prosecutorial and judicial inaction and were discriminatory in effect. The conclusions cited below take into account that in social science research it is

¹⁶ As noted in a UN General Assembly report (2006:85), compensation and other forms of victim assistance can contribute to crime reporting. In this regard, it is noted that “programmes and strategies to empower women by raising their awareness about their rights and enhancing their capacity to claim such rights have been developed in many countries... [and] such programmes can also contribute to increased reporting of violence.”

Also note the comments from Ms van der Walt, Magistrate Pretoria-North, in a South African Law Reform Commission (SALRC) Report (2004:161, paragraph 6.10): “their office has embarked on a strategy whereby sentence is suspended in terms of 297(1)(a) of the CPA on condition that the victim be compensated directly by the offender [and] ever since there has been a significant increase in the court attendance of witnesses.”

¹⁷ With regards to repeat victimization, Freckelton (1998:196) confirms that “even if that sum [of compensation received by complainants] is of very modest dimensions [it] can make a real difference to victims/survivors [as] it can create the opportunity for a person to move cities [and] to buy materials to make their residence safer.”

¹⁸ See for example the comments in United Nations, Commission of Human Rights (2006).

not necessary to prove a social condition with absolute certainty but rather to make reasonable assumptions about its existence.¹⁹

The three (3) conclusions are as follows:

- First, text based research (in Chapter Five) and empirical investigations (in Chapter Seven and Eight) confirmed that although laws and policies were in place to assist victims of sexual violence with their compensatory concerns, in criminal and quasi-criminal proceedings, these laws were persistently overlooked by prosecutors, judges and state-attorneys on account of biases.

Bias was suggested as a leading factor for this omission because interviews and case studies confirmed that state role-players did not assist victims of sexual violence, who are mostly female, because they incorrectly believed: that their financial losses were not quantifiable; that they generally did not want or need compensation; and that they were not placed at a severe gendered financial disadvantage in relation to attending court and post assault health services. Victim surveys undertaken for this thesis rebutted these unfounded assumptions and confirmed: many sexual violence complainants were able to list quantifiable damages relating to both their court appearances, post-assault care and security/relocation expenses; some of these victims would accept compensation from offenders and the state; and modest amounts of compensation would be useful in addressing their unique gendered financial losses.

¹⁹ As noted by Mouton (2009:849, 862 and 864) 'policy interventions are, however, typically complex organizational and institutional programmes that have ambitious multi-sectoral transformation agendas' and therefore it is permissible to allow 'the evaluator to make weak causal claims when evaluating complex social interventions' so long as researchers allow for the 'application of multiple data collection methods' and the utilization of 'all possible data sources [because] the more we know about the case, the more we are able to understand the case within its context.'

Furthermore, research conducted for this thesis also confirmed that the conduct of state attorneys, prosecutors and judges, when they overlooked the compensatory concerns of victims, was also discriminatory for two reasons.

First, discrimination was evident as state officials ignored the unique vulnerabilities of sexual violence victims by not ensuring positive measures were in place to address their unique post assault compensatory concerns. More specifically state officials did not actively canvass available compensation avenues for victims of sexual violence, nor did they ensure effective oversight mechanisms existed to monitor compensatory processes, due to biases and this in turn unnecessarily heightened the disadvantages that sexual violence victims' face, post-assault. This was so because compensation, if awarded, could have assisted these victims with their unique gendered financial barriers in relation to court attendances, post assault medical care and security/relocation expenses.

Also note that discriminatory patterns were evident as other 'classes' of victims in South Africa were regularly provided with compensatory assistance (namely commercial crime victims and violent crime victims in general) in contrast to sexual violence victims who are predominately female. Again this favoritism occurred partly on account of the gender biases held by state officials who assumed that the gendered expenses of sexual violence victims were superfluous and vague, as compared to the expenses incurred by other classes of victims. Further, by improperly differentiating the entitlements afforded to various classes of victims they unnecessarily heightened the disadvantages that sexual violence victims' face, post-assault. This was so because compensation, if awarded, could have assisted these victims with their gendered financial barriers in

relation to court attendances, post assault medical care and security/relocation expenses;

- Second, interviews and case studies confirmed that South African prosecutors and judges rarely addressed discriminatory patriarchal customary compensation arrangements (which were often arranged by male representatives of the victims' and offenders' families) when these customary arrangements arose in sentencing proceedings. Furthermore research confirmed that criminal justice officials did not align customary compensation arrangements with CPA provisions that can provide for incarceration, or other criminal sanctions, when offenders either default on payment, or when offenders improperly direct customary compensation payments to patriarchal figures that negotiate these settlements rather than paying compensation directly to victims so they may attend to their own recoveries. Biases were partly to blame for these omissions as interviews with magistrates and prosecutors confirmed that they did not assist sexual violence victims as they assumed that customary financial agreements were outside of their jurisdictions even though these same agreements were often put forth as mitigating circumstances in which to substantially decrease offender sentences. Therefore, prosecutors and judges unnecessarily exacerbated victims' vulnerabilities as difficult civil execution methods would have been necessary to enforce customary agreements, if and when offenders reneged on these agreements, and also state officials did not ensure victims directly benefited from these patriarchal customary financial agreements when it was clear that they were arranged by male gatekeepers;
- Third, interviews and victim surveys confirmed that prosecutors rarely informed sexual violence victims of available state compensation sources (namely the Social Relief of Distress Grant (SRDG) and Court Witness Stipends (CWS)), when offenders did not provide compensation, despite

prosecutors' awareness that many complainants/witnesses had burdensome economic losses that directly related to their gender, such as childcare, pregnancy and security costs. Biases were partly responsible for this omission as interviews with magistrates and judges confirmed that state role-players incorrectly assumed that government benefits would be abused by sexual violence victims by way of false claims and that victims of sexual violence did not have urgent post-assault economic losses, in relation to their court attendances and health and security concerns, that required government interventions.

In addition to the above overarching conclusions about the existence of biases that lead to discriminatory outcomes this doctoral research also suggests that the failure of the state to ensure the existence of a meaningful compensation process/system for sexual violence complainants contravenes victims' constitutional entitlements for two separate reasons: firstly in relation to equality and non-discrimination (as fully reviewed in subsection 1.2 and subsection 2.1); and secondly in relation to their rights to be free from violence, as compensation can assist in reducing secondary victimization by providing re-location and security upgrade money (this concern is canvassed in subsections 2.2 and 2.3). Furthermore, the Constitution mandates that international law be considered when interpreting the Bill of Rights (namely, section 39(1)(b)²⁰) and this thesis thus considers important international human rights conventions that specifically mention the compensatory rights of victims of violent crime. Finally, international compensatory practices from the developing world are also reviewed to demonstrate that South Africa - like India and Tanzania - can also devise targeted compensatory processes to assist victims of sexual violence while ensuring these interventions do not place too heavy a burden on state prosecutorial resources or national treasuries. In this regard, the Indian province of Tamil Nadu has a functioning compensation scheme for victims of violent

²⁰ Constitution of the Republic of South Africa, 1996 (hereinafter referred to as the Constitution), subsection 39(1)(b).

crime, while Tanzania has mandatory compensatory sentencing laws for sexual violence victims.

In conclusion, this thesis is novel and relevant as it confirms the various types of quantifiable special damages that victims of sexual violence incur, while also demonstrating how these losses can be easily addressed within criminal and quasi-criminal proceedings in South Africa. For example, research conducted in this thesis confirmed how quantification of damages, within criminal compensation proceedings, can be done in ad hoc manner and assets for execution can be located and attached by the police and prosecutors in flexible ways. Furthermore, this thesis contains subjective and participatory observations from sexual violence complainants in South Africa thus contextualizing their compensation needs and desires. In this regard, complainant surveys confirmed that victims of sexual violence require compensation: to fully engage with the formal criminal justice system; to attend to their post assault recoveries, security concerns and family commitments; and, to assist them with their cultural obligations. Lastly, the survey findings confirmed that many sexual violence complainants in South Africa are not able to access free government post-assault health services because of gender, race, and class barriers for which compensation could assist.

1.1 Overview of compensation processes in criminal proceedings

This subsection will briefly review the four (4) compensatory processes that are reviewed in this thesis and also provide foundational theories for these compensatory methods. By way of background, this thesis asserts that these four (4) processes are ignored by prosecutors, state attorneys and judges, partly on account of institutionally ingrained biases, as there are clear laws, judicial pronouncements and prosecutorial directives imploring state role players to assist sexual violence victims with their post assault financial losses within criminal and quasi criminal proceedings. These laws and processes are reviewed in greater detail in Chapter Five and they are briefly outlined in this introductory subsection to delineate the boundaries of the overall research agenda. Furthermore subsection 1.3 outlines other compensatory methods that exist within the criminal justice system but that are not reviewed in this thesis, such as the compensatory provisions in the CJA and section 300 of the CPA.

The first of the compensation processes that are reviewed in this thesis are contained in the CPA and CSA. More specifically, CPA and CSA provisions allow for compensation within sentencing proceedings by way of suspended sentences and/or correctional supervision orders, with or without incarceration orders attached. Also when offenders do not comply with these orders they risk further penal sanctions thus providing an important incentive for compliance.

The theory behind these compensatory processes is clearly summarized by SS Terblanche when he notes that compensation via CPA and CSA processes “is part and parcel of the punishment [of the convicted offender and] the idea is.... that the offender should [not] find it easy to pay compensation, since part of the purpose is to punish him.”²¹ Also he confirms that CPA and CSA compensation must be aligned to the “purposes the sentencing officer wishes to achieve with the sentence [namely deterrence, prevention, rehabilitation and/or retribution].”²²

²¹ Terblanche (2007:363 to 365).

²² Ibid.

Furthermore, he notes that “it is clear that the payment of compensation is a mitigating factor [in sentencing].”²³ This is so because compensation is relevant to one of the three elements that must be assessed when sentencing offenders, namely ensuring the interests of society are considered (while the other two matters that must be reviewed in every sentencing disposition are the nature of the crime and the circumstances of the offender).²⁴ With this in mind he notes that “the interests of society” can include “payment of compensation or other measures which could have the effect of restoring peace and tranquility to society.”²⁵

The second compensatory process reviewed in this thesis involves the use of POCA provisions. Using POCA, victims of sexual violence can assert an interest in the instrumentalities of crime, preserved or forfeited by the State and in this regard case law confirms that instrumentalities can include houses and cars, or other real property, which are used by an alleged offender when he or she commits sexual violence. More specifically, POCA allows third party victims to assert an interest in preserved/forfeited property on the basis of a proposed or issued delictual claim, in relation to alleged sexual abuse that occurred in cars/homes, and there-after request the court to compensate victims from proceeds derived from the sequestered property in question. It is important to note that civil forfeiture is not dependent on securing an ancillary criminal conviction and therefore suspected perpetrators are deemed to be alleged offenders only. The theory behind this compensatory process is clearly summarized by Binns-Ward J. when he notes in *NDPP v Van der Merwe* 2011 (2) SACR 188, that third parties can be assisted with compensation, via properties that have been forfeited to the state, so as to facilitate “exclusionary relief”²⁶ should they have a *bona fide* legal interests in the said property. In this regard, a victim’s legal interest in a forfeited property, as noted by Binns-Ward J.,

²³ Terblanche (2007:363).

²⁴ Ibid.

²⁵ Terblanche (2007:154).

²⁶ *NDPP v Van der Merwe* 2011 (2) SACR 188 at 195 paragraph 9.

can be “wide enough to render the making of a forfeiture order nugatory” as all monies derived from forfeited instrumentalities can go to third party victims, if their legal interests demand this, while the state receives nothing.²⁷ This can occur as POCA provides that third party legal interests must supersede the state’s interest as “forfeiture in terms of Chapter Six of the Act, while it inevitably bears with it a measure of penal effect, is primarily intended to achieve [the] socially remedial objectives [of preventing crime by removing instruments that facilitate illegal activity and compensating victims].”²⁸ With this in mind, if penal objectives were paramount in civil forfeiture processes, which again is not the case, then instrumentalities would accrue solely to the state, as fines and other financial penalties currently do, irrespective of third party interests. With this in mind, it must also be noted that the non-penal nature of forfeiture is important because it ensures that POCA does not offend constitutional provisions regarding the unfair deprivation of alleged offenders’ property, as these deprivations can be justified on account of the important social remedial objectives being pursued [namely, preventing crime by removing instruments that facilitate illegal activity and compensating victims].

The third compensatory process reviewed in this thesis involves the use of government stipends and grants. In this regard, victims of sexual violence can request prosecutorial assistance with their applications for government benefits, namely the Social Relief of Distress Grant (SRDG), and court witness stipends (CWS). The theory behind the SRDG and CWS can be partly gleaned from Mia Swart’s comments when she notes that “social assistance aims at ensuring that those who are poor at least gain access to minimum income to satisfy their basic needs.”²⁹ With Swart’s comment in mind, it can be said that when offenders cannot provide compensation victims must necessarily turn to government for subsidies to attend to numerous post assault expenses which can be said to be

²⁷ *NDPP v Van der Merwe* 2011 (2) SACR 188 at 199 paragraph 15.

²⁸ *NDPP v Van der Merwe* 2011 (2) SACR 188 at 194 paragraph 7.

²⁹ Swart (2012: 56D-4).

“basic” and fundamental as victim/witnesses incur costs in relation to health care, security arrangements and court attendance.

Also it is important to note that the SRDG and the CWS can serve a criminal justice imperative as well, namely the facilitation of witness and complainant cooperation in criminal proceedings. More specifically, prosecutorial facilitation of the SRDG and CWS can be premised on a utilitarian foundation which stresses connections between the provision of compensation and the reporting of crime and witness cooperation at trials, which thus ensures public safety.³⁰ This is so because witnesses will be inclined to cooperate with prosecutors if they know they will help facilitate the SRDG/CWS government benefits.

The fourth compensation process reviewed in this thesis involves indigenous customary compensation agreements, for sexual delicts, or post-assault cleansing rituals. More specifically, prosecutors, in prima facie cases, can

³⁰ Existing state funded victim compensation schemes in Europe and North America are premised to a large degree on a societal utilitarian theory, as compensation can be used as an inducement to victims to cooperate with the criminal justice system. Governments often conceal this utilitarian influence for political purposes as they prefer to be seen as generous social welfare benefactors to vulnerable victims. Katharina Buck (2005: 176) notes, when examining European government compensation schemes for victims of violent crime, that:

Compensation schemes do not officially connect themselves more closely to criminal law and criminal justice. Nevertheless, the link to criminal law and criminal justice reasoning should not be neglected. For instance, both the British and the German schemes require the victim to report the incident and to co-operate with the judicial authorities. In giving crime victims the prospect that the state will compensate them, they are ‘motivated’ to play their role as witness and source of information in accordance with the needs of the criminal justice system. These last observations indicate that criminal justice reasoning influences state compensation provisions much more than generally admitted.

Julie Goldscheid (2004: 216-17), echoes Buck’s analysis, from an American perspective, when she confirms that:

The [United States] congressional findings accompanying the final version of VOCA [Victims of Crime Act of 1984] reflect[ed] Congress’s concern that public respect for the law would be diminished if steps were not taken to help victims. The findings also highlighted Congress’s hope that the compensation program would advance the criminal justice system’s need for victim cooperation. VOCA’s requirement that compensation recipients must report the crime to the police and cooperate in the prosecution concretizes this theory in a very practical way.

provide formal or informal assistance to complainants when customary compensation negotiations take place alongside criminal prosecutions and judges can include customary agreements in suspended sentences and correctional supervision orders thus applying a powerful compliance incentive as defaults in payments can result in further penal sanctions. The theory behind this customary compensatory process is fully reviewed in Chapter Six, and this type of relief is based on the empowerment of female victims by way of court supervised processes that ensure negative patriarchal influences, which often accompany cultural negotiations, are negated. Furthermore, this type of compensation assists victims with their various post assault expenses (as noted in the victim surveys in Chapter Eight and in the case study in subsection 7.2.3) while also ensuring that victims' substantive equality rights are respected.

In concluding this brief overview of the compensatory processes one clarification is required. The term 'compensation' is used to reference both offender sourced compensation orders and state financial assistance. This is consistent with domestic and international law and practice. In this regard, the term 'compensation' is used in South African sentencing legislation³¹ and in the Department of Justice and Constitutional Development's (DOJCD) *Service Charter for Victims of Crime in South Africa*³² to reference offender based compensation. Also it is important to note that offender and state financial assistance to victims of crime is commonly referred to as 'compensation' in international instruments as well.³³

³¹ See subsection 5.1 for South African prescriptions where the term 'compensation' is employed in relation to offender sourced reparations.

³² The DOJCD's *Service Charter for Victims of Crime in South Africa* (2005: 3 and 4) wherein the term 'compensation' is employed in relation to offender sourced reparations.

³³ See subsection 3.1 wherein the term 'compensation' is employed in the *UN Declaration of Basic Principles for Victims of Crime and Abuse of Power* in relation to offender sourced reparations and state reparations. The terms restitution and reparations are used in international law in addition to compensation.

1.2 Overview of bias/discrimination and related concepts

This subsection will first review definitions and concepts that guide this thesis's discussions on gender biases and unfair gender discrimination. These definitions and concepts help frame this thesis's hypothesis which suggests that gender bias, amongst other factors, is preventing the provision of compensation to victims of sexual violence in criminal sentencing dispositions, and in quasi-criminal civil forfeiture proceedings, thus leading to a discriminatory outcome. Following this review of definitions and concepts this subsection will explain how biases can become institutionalized within the structures and culture of the judiciary and the NPA, and why an approach based on substantive equality is required to deal with this institutional problem. Also note that the terms 'gender' and 'sex' have the same meaning in this thesis.³⁴

With regard to the definitions of 'gender bias' and 'gender discrimination' that will be employed throughout this thesis it is important to first note that they are closely aligned to constitutional provisions and constitutional jurisprudence relating to equality and non-discrimination. More specifically, subsection 9(1) of the Constitution confirms that every person 'is equal before the law and has the right to equal protection and benefit of the law.'³⁵ In addition, subsections 9(3) and (5) of the Constitution provides that "direct or indirect discrimination" by the state, on the prohibited ground of "gender", is presumed to be unfair.³⁶ Finally section 9(2) requires the state to positively promote equality.³⁷

³⁴ Albertyn and Goldblatt (2012: 35-55) confirm that "the Constitutional Court tends to use sex and gender interchangeable." In this regard, Albertyn and Goldblatt note that "sex is generally taken to mean the biological differences between men and women, while gender is the term used to describe the socially and culturally constructed differences between men and women." The interchangeable use of these terms is also the practice in this thesis.

³⁵ Constitution, subsection 9(1).

³⁶ Constitution, subsections 9(3) and (5).

³⁷ Constitution, subsection 9(2).

Furthermore, regarding the jurisprudence of the Constitutional Court, Alibertyn and Goldblatt in *Constitutional Law of South Africa*, confirm that unfair discrimination results from differentiations that “deepen[s] or worsen[s] existing disadvantage”³⁸ and that unfair discrimination “can arise where there is an offending act or where there is a failure to act.”³⁹ Also, Alibertyn and Goldblatt confirm that direct discrimination “occurs where a provision specifically differentiates on the basis of a listed or unlisted ground [such as gender]”⁴⁰ while indirect discrimination occurs where “differentiation appears to be neutral and hence benign but has the effect of discriminating on a prohibited ground [such as gender].”⁴¹

With the above constitutional imperatives in mind the below definitions of ‘gender bias’ and ‘gender discrimination’ will be employed in this thesis.

‘Gender bias’ is a process in which irrational stereotypes and unfounded prejudicial assumptions are used by state officials and state institutions to justify either preferential treatment for certain classes of victims (for example commercial crime victims as compared to sexual violence victims), or alternatively, to justify the lack of prosecutorial and court services available to female victims in the criminal justice system.⁴²

³⁸ Alibertyn and Goldblatt (2012:35-43) citing *Prinsloo v Van der Linde* 1997 (6) BCLR 759 (CC) at para31.

³⁹ Alibertyn and Goldblatt (2012: 35-45).

⁴⁰ Alibertyn and Goldblatt (2012: 35-47).

⁴¹ *Ibid.*

⁴² An example of bias in the criminal justice system can clearly be seen in the case of *S v Mabena* 2012 (2) SACR 287, at 291 to 292, where an appellant court reversed the sentence given to a sexual violence offender on account of stereotypical justifications of the trial judge. In this regard the court noted:

“...It was tragic that the complainant herself should have thought that she was to blame for what happened and that her clothing choice had precipitated the outrage perpetrated upon her, but it is even more unfortunate this understandable but false perception on the part of the complainant should have been supported by a court of law, one of whose functions was to administer retributive justice for the crime committed against her.”

‘Gender discrimination’ - which is an outcome of biased decisions – is the unnecessary aggravation of female vulnerabilities, by state role-players (who can be either individuals or institutions ⁴³), when they improperly address gender differentiations in the criminal justice system.

It is important to clarify that discrimination can occur when, due to biases, there is favoritism of one class of victims over another class of victims, or alternatively when there is a reluctance to change current practice or to initiate gender positive measures, that could assist victims of sexual violence with their vulnerabilities and disadvantages. With this in mind, an important conceptual underpinning of the above definition of gender discrimination is the notion that in some situations equality can require the same treatment, and equal application of practices and laws, to ensure the vulnerabilities of disadvantaged groups are not heightened, while in other situations different practices and laws are necessary to ensure the vulnerabilities of historically disadvantaged groups are properly dealt with.⁴⁴

⁴³ Institutions that have oversight powers in the criminal justice system include the following:

- In the case of prosecutors, as noted by Redpath (2012:71), “ultimate authority lies with the National Director of Public Prosecutions (NDPP), who with the Minister [of Justice and Constitutional Development] sets policy directives which must be observed in the prosecution process”;
- In the case of state attorneys involved in civil forfeiture matters, these role-players must take instructions from the National Prosecuting Authority (NPA) so the NDPP is ultimately responsible for policy setting and implementation;
- And finally in the case of magistrates and judges as noted in DOJCD (2012:22), overseers include the Judicial Service Commission, the Magistrates Commission and the Office of the Chief Justice, who all can advise government on any matter relating to the administration/efficiency of justice.

⁴⁴ Note again the comments of Williams in *Unbending Gender* (2000:205-208) regarding this important distinction which she characterizes as the “special treatment/equal treatment debate”:

“...treating women the same can leave women vulnerable...but treating differently can also leave them vulnerable as well... [therefore] feminist should recognize a small realm of “formal equality” where men and women should be treated the same, along with a much larger realm of “substantive equality” where man and women should be treated differently...[this is so because] treating women and men the same will backfire unless [“masculine norms”] are first dismantled. Otherwise women will be further disadvantaged when they are treated the same as men in the face of norms that favor men because they are designed around men’s bodies or life patterns.”

Also note that the above definition of 'gender discrimination' acknowledges that victims of sexual violence, who are mostly female, face unique gendered obstacles in pursuing post-assault justice and health care and it is therefore discriminatory to not assist them in this regard (these unique obstacles are discussed below). With this in mind, it can be said that the criminal justice system as a whole must be more attentive to these victims' needs so their gendered vulnerabilities are not irrationally exacerbated by biases (as this would indirectly lead to discrimination). Applying this logic to this thesis, it is asserted that prosecutors, state attorneys and judges (and their institutional managers) should be more attentive to the financial predicaments of complaints/witnesses in sexual violence cases, by ensuring compensation reviews are not left in abeyance on account of biased decision making, as this unnecessarily heightens their vulnerabilities and disadvantages. With this in mind, victim surveys in Chapter Eight confirmed that compensation could assist sexual violence victims with costs associated with attending court and looking after their post assault health concerns and security arrangements. Also, survey results indicated that many victims did not avail themselves of free psycho-medical services, nor did they fully and meaningfully engage the criminal justice system, on account of economic barriers that are discriminatory in effect (such as childcare, transport and telephone costs).

Once again, an important component of the definition of 'gender discrimination' put forth in this subsection is that unfair gender differentiations, which are based on biased assumptions, unnecessarily heighten and worsen the existing vulnerabilities of women when they interact with the criminal justice system. This delineation is widely recognized internationally and the United Nations Entity for Gender Equality and the Empowerment of Women (also known as UN Women) in their ground-breaking report *In Pursuit of Justice; 2011-2012 Progress of the World's Women*⁴⁵ confirms the various vulnerabilities that female victims of violence face when interacting with criminal justice systems around the world,

⁴⁵ The United Nations Entity for Gender Equality and the Empowerment of Women (2012) (hereinafter referred to as UN Women).

and the discriminatory outcomes that arise when these vulnerabilities are not properly addressed.

In this regard, UN Women confirm that: “while capacity gaps affect all justice service users, gender discrimination means that women typically have less time and money and lower levels of education, exacerbating the challenges [of capacity constraints]”; women who engage with the criminal justice system are involved in a “chain [that] also interacts with a broader range of public services, such as of health care, social services and shelters for women, as well as government institutions that are responsible for implementing laws at the local level”; and women who engage the criminal justice system [often] rely on the “male relatives for assistance and resources... as [often] women are unable to approach justice systems without the assistance of a male relative.”⁴⁶

Furthermore, UN Women confirm that “sexual violence is the only crime for which the victim is sometimes more stigmatized than the perpetrator, with women who report such crimes being shunned by their families and communities.”⁴⁷

Stigmatization is also heightened by the victims’ engagement with the formal criminal justice system itself. In this regard, women must face the following demeaning processes: forensics that require invasive digital penetration and swaps of the victims’ vagina and anus immediately after reporting an intimate sexual violation⁴⁸; repeated questions from state role-players and courts about

⁴⁶ UN Women (2012:52). Note that the enumerated concerns are also present in South Africa as confirmed in Chapter 6, subsection 7.1.2 and 7.2.3 regarding male gatekeepers. Regarding the socio-economic position of women Statistics South Africa (2010:ii) confirms that “poverty patterns continue to be gendered, and female headed households are more likely to have lower incomes, to be dependent on social grants and less likely to have employed members [and] women and female headed households are predominately responsible for the care of children.” Finally, women in South Africa are reliant on municipal and provincial levels of government for social grant provision, and court stipends, as outlined in subsection 5.3.

⁴⁷ UN Women (2012:52 and 53).

⁴⁸ Rape Crisis Cape Town Trust (2005:11) confirms that ‘the [forensic] examination is sometimes embarrassing and uncomfortable’ and ‘you will be asked to lie down on an examination table and the doctor [who is often male] will do an examination of your entire body including your vagina and anus.’ Rape Crisis also confirms that ‘your pubic hair may be combed for evidence of the rapist’s hair, which will be proof of what happened.’

their intimate sexual abuse and their prior sexual history ⁴⁹; and inquiries about their personal health status in relation to HIV, STDs.

Finally, in South Africa's ten year country report on CEDAW it was confirmed that ““women often receive very poor quality medical care after sexual assault, with structural inadequacies, such as not having a private room with walls and a door where examinations can be conducted, the need for standardized clinical management guidelines for sexual assault service delivery, long waiting times, incomplete kits health providers inadequately trained to use the kits and inadequate inter-sectoral collaboration being pointed out as ongoing challenges.”
50

Having established the broad nature of the definitions in this thesis – and the fact that ‘gender discrimination’ can occur when biases heighten the vulnerabilities of women by way of favoritism or by lack of positive assistance - this subsection will now review the institutional character of the definitions put forth. This is important as this thesis suggest that there is widespread non-compliance with NPA policy instructions to prosecutors and judicial precedent in relation to the

Also note Doe (2004:304) a Canadian rape survivor, who confirms her treatment in the Canadian criminal justice system which can mirror the experience of South African victims:

‘a doctor, usually male, [during post assault forensics examinations] gives you an internal to verify penetration and to capture any rape sperm. There is usually a good chance of this as no one has allowed you to pee. You stand on a sheet in the middle of a room. Hairs are removed from your scalp and plucked from your public area. Skin cells are scraped from your shin. Blood is taken from your arm. Saliva from your mouth. They give you massive doses of antibiotics and morning after pills that make you ill. Everything is put into a little box and put away, and you never see it again.... anyone would agree that the tests are invasive and intrusive. I can testify that they are experienced by women involved as a second assault.’

⁴⁹ Doe (2004: 43) confirms that she was forced to repeatedly review the intimate details of her rape in police interviews and police investigation processes, such that she posed the following questions to her readers: ‘I’ll never understand why cops don’t tape-record their interrogations of women who’ve been raped’ and ‘how many times do they have to hear all this stuff?’

⁵⁰ Office of the Presidency (2008:158).

employment of compensatory provisions in sexual violence cases, ⁵¹ and this problem has become institutionalized partly on account of widely held biases that result in discriminatory outcomes. These biases were ascertained in this thesis by way of interviews, surveys and case studies and these sources uncovered gross misconceptions about victims of sexual violence in general and their gendered losses in particular. For example, compensation was not canvassed by prosecutors, judges and state attorneys in part because these decision-makers in the criminal justice system believed that the victims of sexual violence, who are mostly females: did not have quantifiable financial losses; they did not want or need compensation; and they were not placed at a severe gendered financial disadvantage in relation to attending court and health services. As this dissertation demonstrates, these widely held unfounded suppositions were false and therefore the decisions by prosecutors, judges and state-attorneys to forego compensation reviews in sexual violence cases can be said to be partly caused by institutional culture that condoned biases and this in turn resulted in discriminatory outcomes.

⁵¹ Empirical evidence in this thesis (namely interviews in Chapter Seven and surveys in Chapter Eight) confirm compensation is rarely ordered in sexual violence cases despite the below NPA policy positions and court jurisprudence.

With regards to NPA policy see NPA (2011), *Directives issued in terms of section 66(2)(a) and (c) of the Criminal Law (Sexual Offences and related matters) Amendment Act 2007 (Act 32 of 2007)* Part M, section 7, which confirms prosecutors should canvass the compensatory concerns of victims in sentencing proceedings “wherever possible”.

Also note, the NPA’s *Code of Conduct for Members of the National Prosecuting Authority Under Section 22(6) of the National Prosecuting Authority Act 32 of 1998 (2010)* where at Part D (Role in Administration of Justice), Paragraph 2(c) it is confirmed that “prosecutors should...consider the views, legitimate interests and possible concerns of victims and witnesses when their personal interests are, or might be, affected, and endeavor to ensure that victims and witnesses are informed of their rights, especially with reference to the possibility, if any, of victim compensation...”

With regards to South African jurisprudence, Terblanche (2007:362) confirms that “out courts up to the highest level have strongly urged sentencing courts to make use of compensation [in sentencing proceedings].” Also note Du Toit et al. (2011:28-46) confirm that “it is the duty of the court during sentencing to consider the compensatory fine or suspension of the sentence on condition that compensation takes place.”

Unfortunately there is a lack of consensus in academic literature, case law and Constitutional Court jurisprudence on exactly how to define or treat discrimination that has become institutionalized as there are many ambiguities when trying to address this problem, both within a criminal justice context and outside this context. For example Albertyn and Goldblatt cite inconsistencies in South African Constitutional Court equality jurisprudence which confirm that “while some of the Court’s decisions have taken account of the context of women’s lives and the multiple burdens that arise in South Africa’s patriarchal society... gender equality is not always understood or applied adequately by all of the judges on the Court [and] gender issues seem to test many ideas around prejudice and stereotyping that seem less complex when seen through the prism of race.”⁵² Furthermore Albertyn and Goldblatt confirm that “systemic [gender] inequality... [occurs when] inequality is... built into the fabric of our society, not just through laws and rules but through deeply entrenched social practices and attitudes.”⁵³

It would seem therefore that difficulties arise when legislatures, executives or courts try to address gender discrimination within institutions (such as the criminal justice system) as unconscious patriarchal hierarchies⁵⁴ from wider society become embedded within organizational structures and practices and thus institutional culture must be changed as opposed to merely amending laws. For example the DOJCD after many years of consultations and legal drafting

⁵² Albertyn and Goldblatt (2012:35-60 to 35-61). Also note that Albertyn and Goldblatt (2012:35-82) confirm that “the Constitutional Court has repeatedly protected the rights of marginal groups... [but] notable exceptions... concerned claims on the ground of indirect gender discrimination [namely, *Jordan & Others v S* 2002 (6) SA 642 (CC); *Harksen v Lane* NO 1997 (4) SA 1 (CC); *Volks v Robinson* NO 2005 (5) BCLR446 (CC)].

⁵³ Albertyn and Goldblatt (2012:35-77).

⁵⁴ Patriarchal hierarchies are supported by market driven assumptions in society, which are internalized in institutions, which presume men’s domestic and employment contributions have more intrinsic value than women’s domestic and employment contributions. In this regard, Williams (2000:15, 55, and 276) notes some of the problems that arise when these market assumptions are in force: first, “labor literature often minimizes the impact of women’s family work on their market work” and second “gender hierarch[ies] often happens without any bad actor in the picture [as] these roles result from the current structure of work rather than from the systematic abuse of male power.”

incorrectly described the ambit of CPA compensatory provisions in the Victims' Charter, to the detriment of sexual violence victims, by stating that property losses could only be dealt with in sentencing proceedings and not medical, counseling, pregnancy, childcare, security upgrades and other gendered financial concerns.⁵⁵ More specifically, the DOJCD asserted in the Victims' Charter that vulnerable victims of violent crime (including sexual crime) can only pursue compensation for loss or damage to property within criminal proceedings despite ample case law and legislation (as reviewed in Chapter Five) stating that a full range of pecuniary and non-pecuniary losses⁵⁶ may be requested through suspended sentences and composite sentences, which can combine imprisonment terms with correctional supervision compensation orders.

The above example of institutional gender bias, when victims' compensatory entitlements in the Victims' Charter were haphazardly set out, is once again consistent with Joan Williams views of gender discrimination in *Unbending Gender*. In this regard Williams confirms that "much discrimination, far from being intentional, is not even conscious [as] women are systematically disadvantaged by shared expectations built into established patterns of behavior that become institutionalized as simply the way things are done [and therefore] we need to

⁵⁵ The DOJCD's *Service Charter for Victims of Crime in South Africa* (2004: 3) defines "compensation" as "an amount of money that a criminal court awards the victim who has suffered loss or damage to property, including money, as a result of a criminal act or omission by the person convicted of committing the crime." This definition is misleading as it excludes non-property compensation avenues reviewed in Chapter Five. By way of background also note that the 'Victim's Charter' is the most important governmental decree on victims' rights to be issued in the post-apartheid era and this document will serve to guide victims through the legal system by informing them of their legal and constitutional rights.

⁵⁶ See Chapter Five for a review of the CPA compensatory sections and note the various compensation types provided for in the court case studies in Chapter Seven.

Also note the below case law:

- *S v Tshondeni* 1971 4 SA 79 (T) and *S v Magkise* 1973 2 SA 493 (O) where the courts ordered pain and suffering compensation awards as part of suspended sentences for the crime of assault with intent to do grievous bodily harm;
- *S v Kotze* 1986 4 SA 241 (C) where a compensation payment was ordered as part of suspended sentence for contumelia, embarrassment and pain and suffering as it related to an assault against a pregnant woman and her husband.

shift from a model that depicts discrimination as caused by a bad actor, who needs to be removed, to an analysis of established patterns of behavior that operate to disadvantage women in subtle but systematic ways without any one person being at fault.”⁵⁷ Williams also confirms that the above approach “highlights the importance of what social scientists call the interactional model of gender which stresses that gender is heterogeneously produced in a variety of social sites including... courtrooms.”⁵⁸ Finally, Williams confirms that discrimination is especially difficult to address in the criminal justice system because there are many layers or levels of reasoning involved.⁵⁹

In addition to the above noted problems surrounding the institutionalization of male-dominated expectations/norms by way of conscious and unconscious practices (such as biased decision making) to make this problem even more complex Dirk van Zyl Smit, in *Constitutional Law of South Africa*, points out that “difficult questions are raised by the claim that inequalities in sentencing are a function of systemic or structural bias [and] such structural biases complicate legislative interventions.”⁶⁰ When looking at the empirical evidence canvassed

⁵⁷ Williams (2000:253).

⁵⁸ Williams (2000:254).

⁵⁹ Williams (2000:216 to 217) notes the difficulties in dismantling patriarchal barriers and hierarchies in the criminal courts when she outlines how “masculine norms structure the three levels of law”:

“[the three levels are] “formal rules (such as the law of rape), the way the rules are applied (such as the way courts define what constitutes resistance in the context of rape) and social custom... Equality requires changing each type of norm: not only changing the formal rules, but also changing the way judges apply the rules and changing social customs that are embedded in informal rules and unspoken expectations. Often these types of masculine norms can be changed by changing a single rule (such as the code provisions concerning rape) or the way judges apply a rule (such as the way judges apply the resistance requirement). In other contexts, however, women are disadvantaged not merely by a single rule or interpretation but by processes involving many different actors motivated by a variety of stereotypes of which they are barely conscious or blissfully unconscious... [in these situations] women’s disadvantage stems not from a single male norm kept in place by a single institution or actor, but rather from many people (women as well as men) acting in a decentralized way who are driven by (often unconscious) stereotypes.”

⁶⁰ Van Zyl Smit (2012:49-8). This quote is in reference to United States death penalty jurisprudence but is relevant as Van Zyl Smit notes at 49-7 that this problem “is of wider

in this thesis it becomes clear that Dirk van Zyl Smit's concerns are relevant to this thesis as legislative and policy interventions, such as NPA policies mandating compensation reviews in sexual violence sentencing proceedings⁶¹, which seek to overcome discriminatory patterns, were often ignored by state role-players as research in Chapter Seven and Eight confirmed. Again, this thesis asserts that this was partly on account of widespread biases in the judiciary and the NPA which internalized unfair patriarchal social hierarchies from the wider society.⁶² With this in mind, legislative will is often allowed to be ignored, or discarded outright, mainly due to the abundant discretion⁶³ bestowed to criminal justice role-players throughout the criminal justice chain.

Shaun Ossei-Owusu confirms that "discretionary stages in the criminal justice system serve as key sites of race, class and gender subordination."⁶⁴

Furthermore, Ossei-Owusu confirms that "one of the more vexing challenges of addressing misused discretion is getting people to recognize the problems lie not only in the occasional bad behavior or poor judgment of institutional actors, but in entire institutionalized systems of police and prosecutorial training, management and culture."⁶⁵

Other legal researchers have also endorsed the need to review the issue of discretion to fully analyze systemic gender inequalities in the criminal justice sphere. In this regard, Elizabeth Comack and Gillian Balfour in *The Power to*

significance as it can be applied to sentences other than the death penalty [and] it is particularly salient in South Africa because of the similarity of the constitutional provisions ensuring equal protection of the law."

⁶¹ See footnote 51.

⁶² Ossei-Owusu (2010:8) confirms that criminal justice role-players can "recreate the [dominant] social order consciously and unconsciously through discourses, practices and dispositions that are often uncritically acknowledged [and] this is particularly important because gender bias can be produced intentionally or unintentionally."

⁶³ Ossei-Owusu (2010:612) confirms that "discretion is inherently necessary for an efficient criminal justice system... sometimes the civic and social cost of bringing a lawbreaker into the criminal justice system may exceed the benefit [and] moreover, the cascade of crimes and criminals that enter the system make it impossible to investigate and prosecute all cases."

⁶⁴ Ossei-Owusu (2010:608 and 610).

⁶⁵ Ossei-Owusu (2010:613 to 614).

Criminalize explain that ‘the law often constitutes gender and race and class relations in its discretionary spaces rather than in its explicit rules.’⁶⁶ Therefore Comack and Balfour suggest that it is important to discern how ‘judges and lawyers, as social actors, bring with them into the court racist [or misogynistic] ideologies that are rooted in the wider society.’⁶⁷

Discretion is a cornerstone of judicial and prosecutorial functions in South Africa and its contributions to inequality (via biases that lead to discrimination) must therefore be carefully examined. For example, Dirk van Zyl Smit confirms that judges in South Africa have wide sentencing discretion and this is important to this thesis because this discretion can be employed to ensure victims obtain, or do not obtain, meaningful compensation via correctional supervision orders, suspended sentences and civil forfeiture processes. Van Zyl Smit confirms this nuanced type of discretion, in relation to correctional supervision and suspended sentences when he notes that the only restraint in judicial sentencing discretion, other than minimum sentencing laws, is the constitutional requirement of legality (which can be applied in many ways, as it can have many contexts). In this regard Van Zyl Smit states that:

“the question of whether the requirements of legality are met where the courts have so very wide a sentencing discretion is usually posed in respect of the length of the sentence, for example, a term of imprisonment. However, it has equal force in instances where the sentencing court is asked to determine the content of the sentence itself: What, for example, correctional supervision should entail in a particular case.... Courts also have a very wide discretion to suspend sentences on condition that certain requirements are met. The question that the courts face is: what may be regarded as an ‘acceptable penal content’ for such sentences or conditions of suspension? The answer is again related to human dignity and the prohibition of degrading punishment.”⁶⁸

⁶⁶ Comack and Balfour (2004:15).

⁶⁷ Comack and Balfour (2004:36).

⁶⁸ Van Zyl Smit (2012:49-5 to 49-6).

Also note that courts also retain a high level of discretion in civil forfeiture matters as confirmed by Binns-Ward J in *NDPP v Van der Merwe* 2011 (2) SACR 188 when it is confirmed that “the wide discretionary nature of the High Court’s power in treating with a forfeiture application in terms of the [POCA] Act is manifest in the fact that a decision to grant, or refuse to make, an order is made upon a weighing up of any number of relevant disparate and incommensurable considerations – arising from the peculiar facts of a given case – to determine whether the means of forfeiture is a rationally and proportionately appropriate manner of achieving the ends of the [POCA] Act.”⁶⁹

With regard to prosecutorial discretion in South Africa Advocate Nomgcobo Jiba, Acting National Director of Public Prosecutions, confirms the following areas where this may come into play: “whether or not to institute criminal proceedings; whether or not to withdraw charges or stop the prosecution”; “charges [brought] and in which court the prosecution should be instituted”; “whether or not to enter into a plea or sentence agreement”; “whether or not a case should be diverted; and whether or not to accept a plea of guilty tendered by an accused person.”⁷⁰ It is also important to note that many of the compensatory provisions covered in this thesis intersect with the above noted discretionary areas as decisions on plea/sentence agreements, diversions and guilty pleas all affect whether or not compensatory orders are canvassed in criminal and quasi-criminal proceedings. Also it is important to note, as will be reviewed in subsection 7.2.6, that prosecutors have a great deal of discretion when instructing state attorneys in civil forfeiture proceedings as it relates to settlements and draft orders presented to court for endorsement.

The final issue that will be reviewed in this subsection is how the vulnerabilities of sexual violence victims within the criminal justice system should be remedied by South African courts and how the courts should deal with pervasive biases that

⁶⁹ *NDPP v Van der Merwe* 2011 (2) SACR 188 at page 198, paragraph 12.

⁷⁰ *NPA* (2012:5). Also note J Redpath (2012) report.

regularly heighten the historical disadvantages of female victims. In this regard, many academics suggest that to comprehensively deal with vulnerabilities of historically disadvantaged groups, and to meaningfully eradicate discriminatory outcomes, that an approach based on substantive equality must be canvassed, as opposed to an approach based on formal equality.

The distinction between substantive and formal equality is of great importance to gender advocates in South Africa. In this regard Albertyn and Goldblatt confirm that “formal equality is perhaps best described as the abstract prescription of equal treatment for all persons, regardless of their actual circumstances.... [and] its reliance on ‘neutrality’ tends to mask forms of judicial bias and also ignores the actual social and economic differences between individuals and groups.”⁷¹

Conversely, Albertyn and Goldblatt confirm that “a legal understanding of substantive equality proceeds from the recognition that inequality not only emerges from irrational legal distinctions [and formal inequality] but is often more deeply rooted in social and economic cleavages between groups in society.”⁷²

In addition, Sandra Fredman confirms that although “the precise aims and parameters of substantive equality remain contested [in international comparative law] nevertheless, whatever formulation is chosen, substantive equality entails a duty to provide.”⁷³ Fredman therefore suggests that, at the very least, substantive equality requires equal opportunities that are translated into actual transformative outcomes. In this regard she confirms that the “two of the best-known objectives of substantive equality” are “equality of opportunity and equality of results” and these objectives require “positive measures to ensure that persons from all sections of society have a genuinely equal chance of satisfying the criteria for access to a particular social good.”⁷⁴ Finally, she confirms that broadly speaking there are “four specific substantive aims” that guide an

⁷¹ Albertyn and Goldblatt (2012:35-6).

⁷² Ibid.

⁷³ Fredman (2005:167).

⁷⁴ Ibid.

approach that is based on substantive equality, namely: “break[ing] the cycle of disadvantage associated with out-groups”; “redressing stigma, stereotyping, humiliation and violence because of membership of an out-group”; “positive affirmation and celebration of identity within community”; and “facilitat[ing] full participation in society.”⁷⁵

It is important to note that this thesis carefully incorporates the above notions of substantive equality, while providing empirical evidence to show how this equality concern is not properly addressed by state role-players, in relation to criminal compensation provisions. More specifically this thesis argues that sexual violence complainants do not require formal equality in legal prescriptions that facilitate compensatory payments in criminal and quasi-criminal proceedings (as this thesis confirms that women already have this in Chapter Five). Rather, this thesis argues that sexual violence complainants require assurances that their unique economic vulnerabilities (as reviewed in the victim surveys in Chapter Eight) will be addressed by way of positive measures that ensure biases no longer prevent the meaningful provision of compensation to these vulnerable victims via government subsidies, compensatory sentencing and forfeiture provisions, and customary payments from offenders. With the foregoing in mind Albertyn and Goldblatt confirm that there are “multiple and varied legal claims for equality [and] some are for claims of consistency – for similar treatment across difference... yet others have been more redistributive claims, seeking access to economic benefits and resources.”⁷⁶

In concluding this subsection it is important to note what is omitted from this thesis as certain subjects do not assist when pursuing arguments based on discrimination and substantive equality. In this regard, the following issues are not comprehensively reviewed in this thesis as they are ancillary to the thesis hypotheses put forth in this paper (while noting that greater clarity is provided on these omissions and qualifications in subsection 1.3):

⁷⁵ Ibid.

⁷⁶ Albertyn and Goldblatt (2012:35-7).

- Symbolic reparations, as found in the CJA, as this type of compensation does not address the substantive equality concerns of many victims of sexual violence who require substantial amounts of compensation to meaningfully access the formal justice system and to attend to their security concerns and post assault psycho-medical care;
- Offender rehabilitation issues, including child justice issues, as these subject areas do not directly address the substantive equality concerns as noted above;
- Restorative justice processes which seek victim/offender reconciliations. Again these processes do not directly address the substantive equality concerns of sexual violence victims as many victims require monetary compensation while wishing to have no contact with offenders.

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1.3 Exclusions and qualifications

Restorative Justice

'Restorative justice' is a term that is commonly used in the criminal justice sphere both domestically, in South Africa, and internationally. It can refer to a general approach to resolving crime, and also to specific well-established practices (like offender-victim conferences).⁷⁷ On a theoretical level, restorative justice practices and laws seek to address concerns of both the victim and the offender. In this regard Tony Marshall's widely quoted theoretical definition confirms that restorative justice provides "a process whereby all parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future".⁷⁸ On a more practical level, restorative justice practices and laws are frequently used in non-violent crime matters in South Africa and these processes can be incorporated into youth diversion processes pursuant to the CJA.⁷⁹

⁷⁷ Bertelsmann et al. (2012) at 12-29 and 12-30 confirm that :

"the core values of restorative justice... are acceptance of personal responsibility on the part of the offender, the acknowledgement of having offended, the offering and acceptance of an apology, healing for all involved, the extension of forgiveness and reconciliation and restoration. For these purposes a large variety of programs are available, which include psychological programs such as anger management, increasing self-worth, dealing with sexual offences, skills transfers, community service that may range from sweeping police stations to giving lectures or assisting the SPCA. Central to all restorative justice efforts, however, is the need to promote reconciliation... [Also] restorative justice practices come in a wide variety: circle conferences, family conferences, victim/offender meetings, community service, study and skills transfer programs and therapeutic interventions, psychological and psychiatric treatment."

⁷⁸ Marshall (1999:5). McGlynn et al. (2012:215) cite Marshall's definition as "a widely deployed definition".

⁷⁹ Bertelsmann et al. (2012:12-29 and 12:31) confirm that restorative justice "options may not normally be available for organized crime, crimes of violence and other serious offences" and that "at present, the Criminal Procedure Act does not make formal provision for diversion.... and this limits the restorative justice options that are available in matters that cannot be dealt with under the Child Justice Act."

Although restorative justice processes are an important aspect of the criminal justice sphere, especially when dealing with non-violent crime and young offenders, this thesis does not comprehensively review this important trend due to the four reasons cited below. Also note that an explanation is provided after these four considerations are canvassed, as to why customary law, with its reconciliatory underpinnings, is comprehensively reviewed in this thesis while restorative justice provisions and practices are omitted.

The first reason why restorative justice practices are not reviewed in this thesis is that gender experts generally agree that the use of restorative justice techniques/processes/laws, in cases of sexual violence, should be better researched before these procedures are endorsed for common usage.⁸⁰ In this regard many victims of sexual violence do not want to communicate with offenders and power-imbalances can negate the informed consent of participants when they are approached to engage in restorative justice processes.⁸¹ Furthermore, gender specialists who do strongly advocate for its limited use,

⁸⁰ McGlynn et al. (2012:218) confirm that “the exclusion of sexual violence from most restorative justice programmes, in the United Kingdom and across the world... [has resulted] in a vicious cycle: there are few projects, therefore little empirical evidence, leading to continued theoretical discussion, with the attendant critique that the literature is full of theoretical discussion, rather than empirically based evaluations.”

⁸¹ McGlynn et al. (2012:214) confirm that “resistance [about the use of restorative justice practices in cases of sexual violence] comes from those who argue that it may trivialize violence against women, re-victimize the vulnerable, and endanger the safety of victim-survivors [and] such concerns are felt particularly acutely within some violence against women scholarly and practice communities.”

Also, McGlynn et al. (2012:230) quote a rape counselor involved in a restorative justice case study, who confirmed that “restorative justice... is ‘fraught with dangers’ in these situations because of the ‘power dynamics.’” This in turn has implications in relation to the adequacy of informed consent processes.

Also note that Laxminarayan (2010: 61 and 68) confirms that when “measuring crime victims’ pathways to justice” that an “assessment of fair treatment” includes “being able to avoid the offender” and “the victimization may be of such a serious nature that it would be indefensible to require a victim to face the offender [such that] unwanted confrontation with the offender may be perceived as unethical and could lead to higher levels of secondary victimization.” Furthermore the NPA’s *Crime and Criminal Justice Survey (2009: x and xiv)* confirms the importance of monitoring “waiting areas for witnesses where they could sit separately from the accused” and also that “almost a fifth of witnesses [who took part in the survey] experienced intimidation or feared intimidation.”

acknowledge that more research needs to be done before it should become common practice.⁸² With the above in mind the compensation processes covered in this thesis do not require victim communication with the offender and moreover compensation from offenders can be provided to the clerk of the court rather than to the victim directly.⁸³

The second reason why restorative justice is not reviewed in this thesis is because the courts in South Africa do not fully approve of restorative justice processes, within sentencing regimes, for serious sexual violence matters due to the existence of minimum sentencing laws and precedent judgments relating to the seriousness of sexual violence. More specifically, in the *Director of Public Prosecutions v Thabethe* 2011 (2) SACR 567 (SCA) the Supreme Court of Appeal, the highest criminal sentencing appellate court in South Africa, canvassed the appropriateness of a trial sentence (*S v Thabethe* 2009 (2) SACR 62 (T)), that was based on an agreement reached in a victim/offender conference as, overseen by the Restorative Justice Centre in Pretoria. The case involved the rape of a 15 year old girl by a man who was also a surrogate father to the victim. In this regard, Bosielo JA concluded the following:

“I feel obliged to caution seriously against the use of restorative justice as a sentence for serious offences which evoke profound feelings of outrage and revulsion amongst law-abiding and right-thinking members of society [and] an ill-considered application of restorative justice to an inappropriate case is likely to debase it and make it lose its credibility as a viable sentencing option [as] sentencing officers should be careful not to allow some over-

⁸² McGlynn et al. (2012: 234) confirms that “the development of restorative justice in cases of sexual violence must, necessarily, be cautious at this stage, and must be preceded by further debate, evaluations and careful planning..” Also at 237 they only endorse the “ad hoc uses of restorative justice in cases of sexual violence, where there is appropriate planning and support.”

⁸³ Bertelsmann et al. (2012: 12-29) confirm that “offenders often do not have to confront their victims in the criminal justice process, or view them only over the edge of the accused dock [while] restorative justice promotes direct contact between offender and victim.” This thesis suggests that in cases of sexual violence non-contact should be the presumption irrespective of an offender’s inclination to seek out reconciliation. With this in mind, many of the sexual violence victims who participated in the surveys undertaken for this thesis, as outlined in Chapter 8, did not want contact with offenders.

zealousness to lead them to impose restorative justice even in cases where it is patently unsuitable.”⁸⁴

Furthermore Bosielo JA confirmed that “it is trite that one of the essential ingredients of a balanced sentence is that it must reflect the seriousness of the offence and the natural indignation and outrage of the public.”⁸⁵

It is important to note that many legal commentators agree with the judgment in *S v Thabethe*, with one notable dissent on record. In this regard Jamil Ddamulira Mujuzi confirms that “this case raises several issues that are relevant to sentencing but the most important point to note... is that restorative justice should not be emphasized in serious cases such as rape [and] the case also shows that a court does not have to impose a sentence based on restorative justice where such a sentence would be inappropriate irrespective of the fact that a victim forgave and reconciled with the perpetrator.”⁸⁶

Also Bertelsmann et al. confirm that the court in *S v Thabethe* “strongly ruled that a restorative justice approach is misplaced when dealing with serious crimes such as the rape of a minor by her stepfather” while also noting in general that “restorative justice is generally unsuited for dangerous criminals.”⁸⁷

Conversely Anne Skelton, a children’s rights advocate who has written extensively on restorative justice matters, is mentioned in the court’s decision as supporting the use of restorative justice in child sexual violence cases, or at the very least, not pre-empting the use of restorative justice approaches in these sensitive cases. Skelton’s support is premised on the assertion that victims’ voices should be heard and restorative justice provides such a conduit.⁸⁸

⁸⁴ *Director of Public Prosecutions v Thabethe* 2011 (2) SACR 567 (SCA) paragraph 20.

⁸⁵ *Ibid.*

⁸⁶ Mujuzi (2011:405).

⁸⁷ Bertelsmann et al. (2012: 12-31).

⁸⁸ *Director of Public Prosecutions v Thabethe* 2011 (2) SACR 567 (SCA) para15 where it is noted the following:

“The court admitted Mrs. Skelton to intervene as *amicus curiae*. Her main interest in the case was to assist the court to understand the theoretical and jurisprudential basis of restorative justice as an alternative form of punishment

Although it can be argued that restorative justice mechanisms can help bring out victims' voices it can also be argued that power imbalances, as cited earlier, may actually mean that victims' voices are provided under duress irrespective of the informed consent processes that are used in restorative justice cases involving sexual violence.⁸⁹ Furthermore it is unclear what criteria should be used when deciding which sexual violence victims should be approached to take part in restorative justice processes when duress is always a possibility. Finally there are other ways victims voices can be heard in the criminal justice system including the use of victim impact reports which can be presented at sentencing proceedings. With the above concerns in mind perhaps there are too many discrepancies to fully embrace restorative justice practices, in cases of sexual violence, and perhaps this is why legal commentators are in disagreement on their use in these sensitive cases.

The third reason why restorative justice is not reviewed in this thesis relates the capacity constraints of restorative justice service providers, who are often from civil society. Many concerns come to mind in this regard. For example, as noted by McGlynn et al., "international experience suggests that where sexual violence cases are included as part of a generic programme, such as restorative youth conferencing and referral orders, the specific needs of victim-survivors, and the real dangers of re-victimization, are not always taken seriously."⁹⁰ In addition to the problem above, as identified by McGlynn, one must also question the overall

in our criminal justice system. She conceded correctly, in my view, that rape is very serious and endemic in our society. Notwithstanding this, she asserted that restorative justice heralds a new trend in the sentencing philosophy where unlike in the past, the victim's voice deserves not only to be herald but to be accorded appropriate weight in the determination of suitable sentence."

⁸⁹ As noted by McGillivray and Comaskey (1999:176), informed consent can be offset or negated even where a victims agrees in writing to take part in a restorative justice processes or a research process, when there is "overt or subtle agency coercion of potential subjects [and/or] covert withdrawal of services should participation be refused." Also, McGlynn et al. (2012:230) quote a rape counselor who notes that "restorative justice... is 'fraught with dangers' in these situations because of the 'power dynamics.'" This also has implications in relation to informed consent especially if the victim knows the offender, and/or his/her family, and therefore feels obligated to take part in restorative justice processes despite misgivings.

⁹⁰ McGlynn et al. (2012:234).

capacity of civil society service providers in South Africa in relation to governance structures and monitoring and evaluation practices. In this regard, a leading restorative justice service provider in the country, namely the Restorative Justice Center (RJC) in Pretoria (as previously mentioned in relation to the *S v Tabethe* above) confirmed, that after ten years of operations, wherein it worked closely with vulnerable victims on extremely sensitive matters, that they had “no performance management systems in place.”⁹¹ Finally, there are also serious concerns about contingency arrangements in these sensitive matters when restorative justice service providers from civil society have acrimonious relationships with governmental overseers, or when there is problematic governmental interference in their affairs of these service providers. This is a real concern in restorative justice matters as civil society must engage government when they implement programmes so as to have unfettered access to prosecutors, victims and offenders. Turning to a practical and real example of this problem from South Africa, the RJC recently had its services temporarily disrupted when the government tried to cancel its service level agreement.⁹²

⁹¹ Arbitration Award (3 October 2012), Arbitrator: Urd Mansingh, *In re: The Expedited Arbitration, Restorative Justice Centre (Claimant) and Gauteng MEC for Agriculture, Rural Development and Social Development (First Defendant)* at paragraph 60.

Also note the UNODC (2006) *Handbook on Restorative Justice Programmes* confirms the following:

- at 39 to 40, “a number of key factors associated with successful implementation of restorative justice programme include...the creation of valid performance measures or indicators.”
- at 47, “a [effective] governance structure that clearly delineates the responsibilities and accountability of all [civil society] participants... include[ing] the responsibility for...performance monitoring and evaluations.”
- at 47, “once a good governance structure is in place a number of policies should be set in place...including operational policies and procedures on...programme performance and programme evaluation and monitoring.”
- at 81 to 82, “to provide for the possibility of a systematic evaluation, the data needed for evaluation purposes [must] be identified and gathered on a systematic ongoing basis, starting early in the development of the programme, even before the programme is implemented [and] programme performance standards and targets must be set and monitoring mechanisms put in place.”

⁹² Note the following newspaper articles - ‘Legal Centre to Shut Down’ SAPA (30 August 2012) which confirms that “since the RJC was founded 10 years ago, it has helped over 25, 000 people, both criminals and victims of crime.” Also note ‘Center Breached Agreement: Dept’ Citizen Newspaper (August 30, 2012) where it is confirmed that “funding was terminated following investigations undertaken by the department, which lead to the conclusion that the trust between the two parties has been compromised,” said social development department spokesman Sello

More specifically, in an arbitration proceeding⁹³, which sought to reverse this termination of services of the RJC the concerns of the Gauteng Department of Social Development were enumerated, namely:

“the service delivery, professional ethics, practices and protocols at Restorative Justice Center are seriously compromised and therefore a serious case of concern for Department of Social Development, these include, amongst others, the following: lack of or no supervision and guidance which impacts negatively on the quality of service delivery... late and compromised quality of investigations and reports including incidents where reports were compiled without conducting home visits [and] consent forms not completed.... prioritization of cases not always implemented (e.g. 3 months to complete a case of Domestic Violence) and supervisors and staff alleged that they do not have any knowledge of issues related to substance abuse as well as [reporting abuse under] the Children’s Act...”⁹⁴

It must be noted that although the above assertions of the Gauteng Department of Social Development were overturned by the arbitrator, and an order was made requiring the government to reinstate the service level agreement, nevertheless the priorities of victims could have been seriously jeopardized as cases were left in abeyance during the suspension period.⁹⁵

In light of the all of the above practical concerns, it is asserted that restorative justice practices are not suitable in delicate cases of sexual violence, where power imbalances are often evident, as the grave risks of engaging in these activities can often outweigh the possible benefits. Again this is so because service providers may have serious capacity issues and they can be subject to unwarranted governmental interference. Moreover, as the RJC example clearly

Mokoena.” Also it was noted in the Citizen that “the department was taking over the functions for which the Restorative Justice Center received funding [and] an agreement was reached with the head of Restorative Justice Centre that all current files be handed over.”

⁹³ Arbitration Award (3 October 2012), Arbitrator: Urd Mansingh, *In re: The Expedited Arbitration, Restorative Justice Centre (Claimant) and Gauteng MEC for Agriculture, Rural Development and Social Development (First Defendant)*.

⁹⁴ *Ibid* at 2, 3 and 4.

⁹⁵ UNODC (2010:49) confirms that gender responsive criminal justice systems are hampered when “coordinating bodies [do not] work well together.”

confirms, performance monitoring can be absent and this in turn can jeopardize the safety of victims of sexual violence. Although the above noted risks/concerns might be acceptable in cases involving theft and vandalism, it is asserted in this thesis that these risks are unacceptable in sexual violence cases given the unique and heightened vulnerabilities of these victims of the crimes as outlined in subsection 1.2.

The final reason why restorative justice practices are not reviewed is because this thesis focuses on the substantive equality rights of victims of sexual violence, who are mostly women and girls, and the dismantlement of discriminatory institutional barriers that currently prevent the provision of compensation, as opposed to the reconciliatory intentions of offenders and their pressing rehabilitation requirements.

As noted previously, in subsection 1.2, Albertyn and Goldblatt confirm that, “substantive equality proceeds from the recognition that inequality not only emerges from irrational legal distinctions but is often more deeply rooted in social and economic cleavages between groups in society.”⁹⁶ With the foregoing in mind the compensation processes chosen and reviewed in this thesis, are purposefully independent of offender acquiescence⁹⁷ as offenders’ compensatory offers (which are often put forth as mitigating reasons in which to reduce sentences) can also reinforce and mirror “deeply rooted social and economic cleavages in society” if they are not backed up by penal criminal sanctions. In addition, the state compensatory processes chosen for review in this thesis (namely the SRDG and CWS government benefits) can substantially uplift vulnerable women and children at different stages of the criminal process,

⁹⁶ Albertyn and Goldblatt (2012: 35-6).

⁹⁷ The compensatory processes which are advocated for in this thesis are facilitated by way of mandatory penal sentencing orders; forfeited property of alleged and/or convicted offenders, social assistance grants, court witness stipends and finally strict prosecutorial oversight of informal customary payments (which are usually negotiated by male family members of the victim and offender).

irrespective of offenders' means, so as to help victims attend criminal court proceedings and post assault psycho-medical services. This is important as the substantive equality of women in the criminal courts should be premised on the independent agency of women (see subsection 6.1.3 for a discussion on agency) in combination with institutional changes that force court role-players to put aside stereotypes about sexual violence victims and their post assault gendered financial losses.

Turning to the last issue that requires clarification, it is important to explain why customary practices are reviewed in this thesis while restorative justice issues are not covered. Clarification is needed as some legal commentators suggest that customary practices are restorative in nature.⁹⁸ Customary practices are reviewed in this thesis because they directly affect the equality rights of sexual violence victims. More specifically, it is common in the black community in South Africa for offenders to provide informal customary payments to victims in sexual violence matters and these payments sometimes subvert the equality rights of women as male gatekeepers often pressure women and children to abandon criminal prosecutions, or to support non-incarcerate sentences, after settlements have been arranged (see subsection 5.4, Chapter Six and the Case Study Three in subsection 7.2.3). It is also important to note that the UNODC confirms it is important for prosecutors and judiciaries to review customary arrangements which take place alongside criminal prosecutions to ensure the substantive equality of women is upheld when male figures try to obtain the compensation for their own benefit. More specifically UNODC confirms that:

⁹⁸ Bertelsmann et al. (2012: 12-29 and 12-31) confirm "restorative justice incorporates many of the principles and underlying philosophies of justice in customary law... traditional justice generally involves the adjudication of offences by the [male] elders, presided over by the [male] headman or chief, with the opportunity given to every participant in the proceeding to voice his views... traditional justice names and shames, but after reparation has been made the offender is accepted in the community again.... the formal establishment and recognition of the courts of traditional leaders applying customary law in a constitutionally compatible fashion would relieve the congestion in other courts and make a welcome contribution to restorative justice."

“...a fair, effective and representative criminal justice system is one that is... gender-responsive and works to identify and address gender biases.. [and therefore it is important to review cases] where the father or husband is given restitution in cases of rape.”⁹⁹

⁹⁹ United Nations Office on Drugs and Crime (UNODC) (2010:2 and 26).

The Child Justice Act 75 of 2008 (CJA) and Children Offenders

The CJA is an important statute but it is not directly covered in this thesis for the five substantive reasons set out below. Also note, by way of background, that the CJA came into force after the author completed this thesis's empirical research from 2006 until 2008 (namely interviews, case studies and victim surveys).

Therefore the CJA was not incorporated into this thesis's qualitative research design which sought to identify institutional biases via non-text based sources.

The first substantive reason why the CJA is not reviewed is because parents are financially responsible for children and therefore it is expected that most children will be enrolled in school rather than gainfully employed.¹⁰⁰ It is therefore reasonable, for the purposes of this thesis, to exclude CJA compensatory processes as most child offenders would be unable to provide compensation to victims as the vast majority of children are financially insolvent.¹⁰¹

¹⁰⁰ See the unreported decision of SS and The Presiding Officer of the Children's Court: District of Krugersdop and others (29 August 2012) South Gauteng High Court wherein the duty of parents to support children is outlined. In this regard it is confirmed that "biological parents of children, whether married or unmarried, have a duty of support [and] this common law principle is now also reflected in section 18(2)(d) of the Children's Act 38 of 2005 which lists "to contribute to the maintenance of the child" as among parental responsibilities." Also it is noted that "both maternal and paternal grandparents, regardless of whether the mother and father were married have a duty to support... [and] in determining whether any person has a legal duty of support in respect of a minor child, cognizance must also be taken of customary law."

¹⁰¹ The National Institute for Crime Prevention and the Reintegration of Offenders (NICRO), the largest youth diversion service provider in South Africa, agreed with this position in their *Submission on the Child Justice Bill (Bill 49/2002) (31/10/2002)* wherein they confirmed the following: "NICRO submits that as a general rule compensation or restitution in monetary terms should be excluded as children do not have the means to pay victims, and further, parents should not be held accountable for their children's offending by being punished with financial sanctions [and] rather, community service could be rendered to the victim as a form of symbolic compensation" [www.childjustice.org.za/submissions/NICRO.htm, accessed on 20 February 2013].

Furthermore, NICRO confirmed that they have not been "involved in cases where victim compensation orders specifically has been ordered as part of any diversions [they have dealt with]" [NICRO email to author from Arina Smit, Programme Design and Development (27 February 2013)]. It should also be noted that other jurisdictions have experienced the same lack of utilization of compensatory provisions. For example, regarding the Italian juvenile justice system, Nelken (2006:ftn37) confirms that "arrangements for restitution and compensation to the victim, though theoretically possible are rare."

The second reason why the CJA is not covered is because the compensation provisions in the CJA are “symbolic” while victims have extensive expenses.¹⁰²

¹⁰² The Child Justice Act 75 of 2008 (hereinafter referred to as the CJA) in section 1 (Definitions, Objects and Guiding Principles of Act) only lists the definition of “symbolic restitution” and not “compensation” or “restitution” thus highlighting the intrinsic nature of compensatory provisions in the CJA. In this regard “symbolic restitution” is defined as: “the giving of an object owned, made or brought by a child or the provision of any service to a specified person, persons, group of person or community, charity or welfare organization or institution as symbolic compensation for the harm caused by that child.”

Furthermore, sub-section 51(f) (Objectives of Diversion) of the CJA prescribes that diversion should “encourage the rendering to the victim of some symbolic benefit or the delivery of some object as compensation for the harm” while the majority of the remaining objectives in section 51 involve accountability, reintegration, reconciliation, prevention of stigmatization, reduced recidivism, and child development. It can be said that the provision of meaningful victim financial compensation is a secondary concern to the rehabilitative objectives of diversion.

Regarding subsections (p) and (q) of section 53 (Diversion Options) of the CJA the following is prescribed: “[diversion can include] payment of compensation to a specified person, persons, group of persons or community, charity or welfare organization or institution where the child or his or her family is able to afford this: and where there is no identifiable person, persons or group of person to whom restitution or compensation can be made, provision of some service or benefit or payment of compensation to a community, charity or welfare organization or institution.” Again, these compensatory options clearly stress the reintegration and reconciliation aspects of compensation orders with references to charities, family contributions and payments to organization when there is no victim. Again it can be said that the provision of meaningful victim financial compensation, to assist them with burdensome expenses in relation to their post assault recoveries, is a secondary concern.

Finally section 55 (Minimum standards applicable to diversion) of the CJA confirms that “diversion options, in keeping with the objectives of diversion must be structured in a way so as to strike a balance between the circumstances of the child, the nature of the offences and the interests of society” and in subsection (2)(c) it prescribes that “[diversion may] include an element which seeks to ensure that the child understands the impact of his or her behavior on others including the victims of the offence and may include compensation or restitution.” Again it can be said that the provision of meaningful victim financial compensation is a secondary concern with the focus on offenders’ remorse, or understandings of impact, being a priority.

Turning to compensatory sentencing options, should diversion not be advisable, and a conviction is registered, the same rehabilitative and reconciliatory language is present in sentencing section 74 (Fines or alternatives to Fine), subsection (2)(a) and (b) of the CJA, as this section also includes references to “symbolic restitution” and “payment of compensation... where the child or his or her family is able to afford this.” Again, it can be said that the provision of meaningful victim financial compensation is a secondary concern due to the symbolic nature of the compensation stipulated.

With regards to legal and academic commentaries, in relation to the symbolic nature of compensation in the CJA, Steyn in his Doctoral thesis (2010:19 and 34) confirms that one purpose of diversion, as outlined in Section 51 of the CJA, is to “provide opportunity for victims to express their views and benefit from some form of compensation (albeit symbolically).” Also the DOJCD (undated:6), in their CJA information booklet, confirms that offenders may make “an offer to pay a fine or make another form of symbolic restitution such as fixing a broken window from his or her own pocket money.”

The third reason why the CJA is not covered is because there are problems balancing a child's rehabilitation need (a constitutional and human rights imperative ¹⁰³) with the disparate goals of monetary punishments which claim to change both children's and parents' behaviors while also preventing re-offending in the future. In this regard, difficult questions arise as to whether accountability/punishment is negated if money comes from a child's surplus income or savings, or from parental sources (as provided for in the CJA), as many commentators argue that punishment should instead be tied to community service and behavior courses, when young offenders are involved, rather than to monetary impositions. ¹⁰⁴

¹⁰³ For example subsection 28(1)(b) of the Constitution prescribes that "every child has the right... not to be detained except as a measure of last resort."

¹⁰⁴ Regarding the first issue, in relation to child offenders surplus income or savings, the American Prosecutors Research Institute (APRI) suggests, in the *Guide to Developing and Implementing Performance Measures for the Juvenile Justice System* (2006:19), that restitution/compensation should not be a mere money exchange but rather a process leading to the rehabilitation of youth offenders when it notes that: "organizations should pay attention not only to the rates of completion of community service and restitution payments but also to the politics and practices related to those measures [because] if we wish to ensure these sanctions have value beyond simple transfer of money or completion of tasks and are capable of achieving outcomes such as reductions in re-offending and increased victim satisfaction, more attention should be directed to the process by which restitution and community service are negotiated and achieved." Also APRI suggests (2006:19) that "although 80% of those ordered to pay restitution have done so, only 62% of the actual funds have been collected [and] examining the data, the team determined that some judges were ordering as much as \$30, 000 [USD] in restitution, which not only skews the results but sets the offenders up for failure and disappoints the victims."

Turning the role of parents' English jurisprudence is helpful in assessing the goals and rationales behind parental compensation orders. In this regard, courts in England have recently tempered their support for compensation from the parents of offenders with other practical concerns. In this regard, Stone (2004:138) suggests that "the Court of Appeal appears to have shifted from a presumption in favor of financial liability, unless this is demonstrably 'unreasonable' to a presumption that liability is unreasonable unless parental oversight has been deficient or at fault, or (even more strongly) that the parent has been in some way casual in the commission of the offence." It is worth noting, as an aside, that if the above position was also applied by South African courts in relation to parental compensation in the CJA (there is no case law as of yet on this point) perhaps this could open up a can of worms as courts would need to judge parenting styles, within a criminal justice context, in a culturally diverse and unequal society. This may not serve victims or young offenders and their families. Also, it is important to note that in South Africa the CJA does not specify the due process rights of parents when compensation orders are canvassed against them for their children's' criminal misconduct. In this regard, N Stone (2004:141) confirms that in England parents must be provided with an opportunity to present the court with "informed parental representations" before orders are made against them for the conduct of their children.

Barry Fields agrees with the above proposition and further notes that “restitution is often employed as a supplementary sanction to incarceration, fines etc. [and] in this sense restitution can come to be seen as just one more form of punishment, greatly reducing its capacity to act as a restorative [or rehabilitative] mechanism.”¹⁰⁵

Other legal commentators agree with Fields’ position, namely NICRO¹⁰⁶ along with Kathryn Hollingsworth, who notes that compensation orders can “detract from the development of a child’s responsibility.”¹⁰⁷ Also Hollingsworth notes that there is academic criticism of parental compensation orders (when parents are ordered to pay compensation on behalf of child offenders as is also provided for in the CJA) when she suggest the following shortcomings: “the inappropriateness of using criminal law mechanisms to coerce ‘good parenting’, increased likelihood of family conflict, the targeting of particular social groups for increased social control, the displacement of the state’s responsibility towards children, and the (mis)use of the law as part of a normative project to re-moralize the family and mould images of ‘good parenting’.”¹⁰⁸

The fourth reason why the CJA is not comprehensively covered in this thesis is because it is difficult to obtain statistics or to gauge the current employment of CJA provisions in general, not to mention compensatory provisions in particular, to assess if they are being applied in a discriminatory manner. This is important as this thesis suggests that prosecutors, state attorneys and magistrates act in a

¹⁰⁵ Fields (2003:46).

¹⁰⁶ NICRO, the largest youth diversion service provider in South Africa in their *Submission on the Child Justice Bill (Bill 49/2002)* (31/10/2002) confirmed the following: “NICRO submits that as a general rule compensation or restitution in monetary terms should be excluded as children do not have the means to pay victims, and further, parents should not be held accountable for their children’s offending by being punished with financial sanctions [and] rather, community service could be rendered to the victim as a form of symbolic compensation” [www.childjustice.org.za/submissions/NICRO.htm, accessed on 20 February 2013].

¹⁰⁷ Hollingsworth (2007: 200 to 201).

¹⁰⁸ Hollingsworth (2007: 211 to 212)

discriminatory manner in relation to the employment of compensatory processes thus neglecting the substantive equality rights of victims of sexual violence. In this regard, difficulties arise for the below reasons:

- The NPA only keeps strategic targets for broad alternative dispute resolution mechanisms (ADRM) which encompass diversions levels but without desegregating types of diversions ordered. With this in mind these ADRM statistics do not delve into compensatory CJA targets or any other sub-targets. Conversely, it is important to note that the NPA strategic plans do provide targets for the compensatory CPA and POCA processes that are comprehensively reviewed in this thesis; ¹⁰⁹
- The CJA only came into force in mid-2010 and therefore criminal justice role-players are only now implementing evaluation mechanisms and reporting structures in relation to various aspects of the Act including the compensatory provisions. With this in mind, the NPA, DOJCD and civil society have not reported on compensatory orders in the CJA to date. ¹¹⁰ Lag times between evaluations can also be found in other jurisdictions. For example the American Prosecutor Research Institute (APRI) confirms that “typically it takes at least a year to process juvenile court data and more time to develop and publish reports [and] consequently, juvenile justice administrators, planners, policy makers and scholars frequently rely on data that are two years old or more to make operational decisions, plan programs, analyze policies or evaluate programmes.” ¹¹¹ In addition, NICRO, the largest diversion service provider in South Africa, does not disaggregate its young offender case files in line with the CJA so it is

¹⁰⁹ Note the NPA's (2012), *Annual 2012 Performance Plan*, section 2.1(2) regarding ADRM/Diversion; and section 4.1(3) and (4) regarding POCA and CPA compensation.

¹¹⁰ NICRO email (12 February 2012) from Regan Jules-Macquet (Project Manager) where the following was confirmed: “CJA compensation, it’s too new for there to be much public domain data about [it, and there is none at NICRO].”

¹¹¹ American Prosecutors Research Institute (2006:16).

currently impossible to confirm what CJA diversion and sentencing options are employed by NICRO;¹¹²

- In light of the recent introduction of the CJA, there is little reported case law on the Act, in relation to sexual violence matters.

Finally, the fifth reason why the CJA is not comprehensively reviewed in this thesis is because this thesis focuses on the substantive equality rights of victims of sexual violence, and the dismantlement of discriminatory institutional barriers, as opposed to theories about suitable punishments for young offenders. With this in mind, it is asserted that a focus on youth offenders would only serve to conflate the issue of child justice with the main concern of this thesis, namely the substantive equality rights of sexual violence victims, and these two important matters would end up being pitted against each other. This dynamic does not serve survivors of sexual violence as they should not be placed in a situation where their calls for substantive equality, by way of criminal compensation processes, are placed in doubt solely on account of ancillary concerns relating to child sentences and child rehabilitative priorities. More specifically, substantive equality requires the utilization of criminal compensatory processes to uplift women so they can attend court and attend post assault health services and with this in mind female victims should not be put in a situation where they feel uncomfortable seeking out compensation solely because it would cause financial hardship to child offenders or their families. Further, this thesis suggests that compensatory processes must be gender sensitive and the provision of state compensation (through the SRDG and CWS) should be available when victims do not feel comfortable approaching child offenders (and their parents) for compensation for a variety of reasons.

¹¹² Despite a lack of statistical data, by consulting with staff members, NICRO confirmed that they have not been “involved in cases where victim compensation orders specifically has been ordered as part of any diversions [they have dealt with]” [NICRO email to author from Arina Smit, Programme Design and Development (27 February 2013)].

Finally, in concluding this brief review of the CJA it is important to note that the CJA is indirectly dealt with in this thesis when reviewing correctional supervision orders and suspended sentences. In this regard, the most serious sexual crimes, such as rape and the other sexual offences in Schedule Two and Three of the CJA, are considered too serious to be dealt with via diversion processes and therefore, for the most part, will be dealt with via the sentencing provisions of the CPA (while acknowledging that all of the procedural and substantive safeguards in the CJA would also need to be adhered to prior to imposing a sentence, should diversion not be applied).¹¹³ More specifically, Part Two of the CJA (Sentencing Options) prescribes the following sentencing options for young offenders and children: community-based sentences; restorative justice sentences; fine or alternatives to fine; sentences involving correctional supervision; sentence of compulsory residence in child and youth care centre; sentence of imprisonment; and finally postponement or suspension of passing of sentence. With this in mind, two of the most commonly employed sentencing options in the CJA, for violent crime matters, are correctional supervision orders and suspended sentence options, via the CPA, which are already comprehensively covered in this thesis in Chapters Five and Seven.¹¹⁴

¹¹³ The CJA provides the following procedural and substantive safeguards in relation to child offenders: criminal capacity restrictions; pre-trial/diversion release stipulations; assessment provisions; preliminary inquiries; diversion provisions; provisions for trial in child court; sentencing guidelines; and appeals and reviews.

¹¹⁴ Note the following cases, from the South African Criminal Law Reports (SACR), up to Volume 1 of 2013, of a sexual and non-sexual nature, that have referenced the CJA. Underlined emphasis has been added by author to delineate the CJA sentences imposed by the lower courts and High Courts while noting that correctional supervision is often applied for serious young offender crimes such as rape.

i) S v MK 2012 (2) SACR 533 (SGHC) – young offender convicted of two counts of rape of minor boys and sentenced by the trial court to 5 years imprisonment and thereafter High Court remitted the matter back to the trial court to consider sentence afresh as correctional supervision under the CPA was wrongly precluded by trial judge due to seriousness of offences and the probation report recommendation was ignored in relation to detention for therapy and probation officer supervision under CJA sub-sections 53(4)(c) and (d), which are level two diversion options involving serious offences. By way of background CJA 53(4)(c) involves the “referral to intensive therapy to treat or manage problems that have been identified as a cause of the child coming into conflict with the law, which may include a period or periods of temporary residence” while CJA(4)(d) involves the “placement under the supervision of a probation officer on conditions

Also note that Bertelsmann et al. confirm that “correctional supervision is a sentence that is imposed upon an accused who, in the opinion of the court, should serve his sentence, or part thereof, in the community rather than in jail [and] section 276A CPA has been amended by the Child Justice Act 75 of 2008 to include reference to section 75 of that Act, to which this section is now subject, and which provides that correctional supervision can be imposed upon child

which may include restriction of the child’s movement outside the magisterial district in which the child usually resides without the prior written approval of the probation officer.”

ii) S v FM 2013 (1) SACR 57 (NGHC) – young offender convicted of rape when he penetrated a minor girl with mental disabilities and was sentenced by the trial court to 15 years imprisonment (5 years suspended for 5 years) and thereafter the High Court confirmed decision but suggested that a CPA 276(1)(b) prison sentence was not the best option as the trial judge could have employed 276(1)(i) of the CPA which is a prison sentence that can be reverted to correctional supervision by the appropriate corrections official.

iii) S v L 2012 (2) SACR 399 (WCHC) - young offender convicted of murder and sentenced by the trial court to 10 years imprisonment (four years suspended) before CJA in force, and thereafter the High Court cited a material misdirection as CJA should have been referenced, alongside section 28(1)(g) of the Constitution, and correctional supervision under the CPA should have been considered taking into consideration the CJA and the Constitution.

iv) S v LM 2013 (1) SACR 188 (WCHC) - young offender convicted under the Drugs and Drugs Trafficking Act 140 of 1992 and sentenced to a postponement of sentence in terms of section 297(1)(a)(i) of the CPA and 78 of the CPA – the High Court confirmed the postponement of sentence.

v) S v Gani No 2012 (2) SACR 468 (SGHC) - young offender convicted of theft by trial court and Magistrate sought High Court advice for sentencing. High Court set aside conviction as CJA diversion should have been considered before and during trial.

vi) S v RS and others 2012 (2) SACR 160 (WCHC) - young offender convicted of housebreaking and theft and trial court sentenced offender to 3 years imprisonment while the High Court set aside sentence and replaced it with 18 months of correctional supervision under the CPA.

vii) S v CS 2012 (1) SACR 595 (ECHC) - young offender convicted of using a car without consent of owner and housebreaking with intent to steal and trial court sentenced offender to 2 years compulsory residence in a child and youth care centre pursuant to subsection 76(1) of the CJA. The High Court confirmed the sentence of 2 years compulsory residence in a child and youth care center.

viii) S v BL 2013 (1) SACR 140 (NGHC) - young offender convicted of robbery with a firearm and trial judge sentenced youth to correctional supervision under the CPA while the High Court agreed to the correctional supervision sentence but remitted the matter back to the trial court so it could reference CJA sections 72 (community based sentences) and 75 (sentences involving correctional supervision).

offenders, with an option of imprisonment only in respect of child offenders older than fourteen years.”¹¹⁵

Finally note section 78 of the CJA (Postponement or suspension of passing of sentence) in relation to suspended sentences, which confirms that “the provisions of section 297 of the Criminal Procedure Act apply in relation to the postponement or suspension of passing of sentence by a child justice court in terms of this Act... [and] in addition to the provisions of section 297 of the Criminal Procedure Act the following may be considered as conditions... fulfillment of or compliance with any option referred to in [a closed list of diversion options].”¹¹⁶

¹¹⁵ Bertelsmann et al. (2012: 11).

¹¹⁶ Child Justice Act, section 78.

Civil/Delictual Claims and Section 300 of the CPA

This section will briefly review why civil/delictual claims are not comprehensively reviewed in this thesis while taking cognizance of the fact that this is a specialized Doctorate in Criminal Justice, which was conceived and planned within a Criminal Justice Department, and therefore criminal processes, procedures and practices are focused upon. This section will also explain why civil forfeiture proceedings, as undertaken by the NPA, are covered in this thesis, while section 300 CPA compensation claims (for property losses only) are omitted.

Civil claims are not covered in this thesis as '*complainants/witnesses*' are a different class or category of aggrieved person, when compared to '*plaintiffs/applicants*' who seek civil damages (of course some victims may proceed under both criminal and civil law, but each area requires a different analysis and conceptual framework).¹¹⁷ In this regard, this thesis asserts that '*complainants/witnesses*', who take part in sexual violence prosecutions, should be financially supported by offenders or the state, within the criminal justice system framework, as they provide valuable assistance to prosecutors and the courts when cases are prosecuted (which often results in secondary victimization¹¹⁸), and they also assist law enforcement when they identify alleged

¹¹⁷ Laxminarayan (2010:63) confirms that complainants/witnesses in criminal proceedings can "be distinguished from non-criminal litigants in several ways... first crime victims face [greater] emotion[s]... secondly victims are represented by the state....thirdly...recovery of the victims suggest[s] a long term concern....finally specific categories of vulnerable victims may suffer severe consequences due to the structure of criminal proceedings."

¹¹⁸ Regarding secondary victimization, Doe (2004:304) a Canadian rape survivor notes her treatment in the criminal justice system which mirrors the experience of South African victims:

'a doctor, usually male, [during post assault forensics examinations] gives you an internal to verify penetration and to capture any rape sperm...Hairs are removed from your scalp and plucked from your public area. Skin cells are scraped from your shin. Blood is taken from your arm. Saliva from your mouth. They give you massive doses of antibiotics and morning after pills that make you ill. Everything is put into a little box and put away, and you never see it again.... anyone would agree that the tests are invasive and intrusive. I can testify that they are experienced by women involved as a second assault.'

offenders so that monitoring of suspected individuals can be undertaken (irrespective of convictions).

With the above in mind, this thesis focuses on the compensatory issues that victims must address in the criminal justice system independent of civil remedies. For example, the following questions are posed in this thesis. Why do prosecutors and state attorneys neglect important criminal compensation provisions when they could be of great benefit to victims of sexual violence? In this regard, many offenders have disposal incomes that could be subject to conditional sentences¹¹⁹ and in the case of forfeiture, money can be provided to victims when instrumentalities have been forfeited and executed by the state. Another issue related to the criminal processes and the compensatory concerns of victims is what are the responsibilities of prosecutors in relation to victim compensation reviews and social grant referrals? Finally, the last concern covered in this thesis, that solely involves criminal justice concerns, is how should the judiciary deal with informal patriarchal customary settlements that have been arranged alongside criminal court proceedings? More specifically customary compensation arrangements can be a mitigating factor in sentencing (as these arrangements provide helpful post assault money to victims), or conversely an aggravating factor (as these financial agreements can also be used to suppress women, as they are often arranged under duress, by male representatives of the victims and the offenders, with the goal of securing victim

Also note that Rape Crisis Cape Town Trust (2005:11) confirms that 'the [forensic] examination is sometimes embarrassing and uncomfortable' and 'you will be asked to lie down on an examination table and the doctor [who is often male] will do an examination of your entire body including your vagina and anus.' Rape Crisis also confirms that 'your pubic hair may be combed for evidence of the rapist's hair, which will be proof of what happened.'

¹¹⁹ Research undertaken in this thesis in subsection 8.6, confirms that many sexual offenders have means to compensate victims via correctional supervisor and suspended sentenced orders. For example, Jewkes et al. (2009) confirmed, after surveying 1738 households in the Eastern Cape and Kwa-Zulu Natal, that men who raped were likely to be educated and also likely to earn over R500 per month.

endorsements for non-incarcerate sentences or securing victim absences from court).¹²⁰

Turning to the qualifications mentioned at the start of this section, it is important to note that section 300 of the CPA¹²¹ is not reviewed in this thesis as it only can compensate victims for property replacement/damage, and secondly, its execution must be facilitated by way of the civil courts. Regarding the narrow heads of damages that can be reviewed, it is clear that s 300 becomes almost irrelevant when one considers that victims of sexual violence mostly incur non-property damages relating to their appearances in court, security arrangements and their psycho-medical care. In this regard, the survey results undertaken in Chapter Eight confirm that victims incur the following types of damages when seeking to access the criminal justice system and when seeking post-assault care: transportation costs; medical costs; telephone costs; emergency housing

¹²⁰ Note Terblanche (2007:363) where it is confirmed that “it is clear that the payment of compensation is a mitigating factor [in sentencing].” Also note the United Nations Office on Drugs and Crime (2010:2 and 26) confirm that it is important to ascertain if “payment of restitution in certain gender-based cases provide the basis for a decision by the prosecutor not to prosecute... [and] are there cases where restitution is prohibited by law yet continues as a customary practice (e.g. where the father or husband is given restitution in cases of rape)?” Also note interview findings in subsection 7.1.2 wherein prosecutors and magistrates confirmed that customary compensation arrangements often influenced attrition rates.

¹²¹ Section 300 of the CPA can be ordered within sentencing proceedings but its execution must be completed in civil courts and only property damages can be reviewed. In this regard see relevant sections with emphasis added below:

300(1) Where a person is convicted by a superior court, a regional court or a magistrate's court of an offence which has caused damage to or loss of property (including money) belonging to some other person, the court in question may, upon the application of the injured person or of the prosecutor acting on the instructions of the injured person, forthwith award the injured person compensation for such damage or loss...

(a) An award made under this section-

(i) by a magistrate's court, shall have the effect of a civil judgment of that court;

(ii) by a regional court, shall have the effect of a civil judgment of the magistrate's court of the district in which the relevant trial took place.

(b) Where a superior court makes an award under this section, the registrar of the court shall forward a certified copy of the award to the clerk of the magistrate's court designated by the presiding judge or, if no such court is designated, to the clerk of the magistrate's court in whose area of jurisdiction the offence in question was committed, and thereupon such award shall have the effect of a civil judgment of that magistrate's court.

costs; security/relocation costs; employment losses; school cancellation fees; counseling costs; childcare costs; legal fees and pregnancy related expenses.

With regards to the second qualification about section 300 orders it is important to note that these orders must be executed civilly and therefore they can be expensive and time consuming to enforce. This is especially so if defendants claim to be 'judgment proof' as this can lengthen civil proceedings and perhaps completely block the final execution of civil judgments. Of course the above proviso may not apply where victims are abused in institutional settings (such as schools, churches, and places of employment), or alternatively, where there is state liability on account of negligence (via vicarious liability or by the direct omission or actions of state officials), as defendants in these cases have access to unlimited financial resources, Nonetheless many victims in are abused in homes so this is often not the case for the majority of complainants in South Africa.

With the foregoing in mind, the author submits that the criminal compensatory processes reviewed in this thesis (namely compensation via suspended sentences and correctional supervision orders, compensation via forfeiture orders and compensation via the SRDG and CWS government benefits) overcome the disadvantages of section 300 CPA orders as they are undertaken at the state's expense and are available to all victims irrespective of problems inherent with civil executions which may necessitate hiring a lawyer. Moreover, offenders who do not comply with compensatory sentencing orders may be subject to penal sanctions thus incorporating a powerful compliance incentive not found in civil remedies or section 300 of the CPA.

With regards to correctional supervision orders, SS Terblanche confirms that; "in terms of [section 276A(4) of the CPA]... the court that originally imposed the correctional supervision is empowered to reconsider its own sentence [on default] and replace it with another (competent) sentence [and] the whole

spectrum of sentencing options [including imprisonment] becomes available again if correctional supervision fails.”¹²² Furthermore, De Toit et al. confirm that “where the accused does not comply with the conditions of his correctional supervision the provisions of s276A(4)(a) must be applied [and] this requires that the Commissioner of Correctional Services or a probation officer should make a motivated recommendation before the Court can impose another sentence.”¹²³

Regarding suspended sentences SS Terblanche confirms that “it is the rule rather than the exception that a suspended sentence will be put into operation [including a sentence of imprisonment] if compliance with conditions was in the control of the offender and the offender failed to comply.”¹²⁴ Furthermore, De Toit et al. confirm that “upon prima facie indications that a condition was breached or not complied with, the person concerned may be arrested on a warrant issued by any court and detained until the matter can be investigated by the court.”¹²⁵

Lastly it is important to note that the author chose to include a review of civil forfeiture proceedings, as opposed to civil remedies in general. In this regard, civil forfeiture proceedings are quasi-criminal processes and necessarily involve the following: police investigators that work closely with the NPA; prosecutors from the NPA who instruct state attorneys; and finally important crime control purposes (also see subsections 5.2 for a full review of forfeiture provisions in POCA). With this in mind, the NPA includes forfeiture targets in its annual strategic objectives, along with victim compensation derived from POCA provisions, and as such forfeitures rates and POCA compensation levels are used by Parliament and other stakeholders to evaluate the annual performance of the prosecution authority.¹²⁶ These prosecutorial performance targets confirm

¹²² Terblanche (2007:310).

¹²³ De Toit (2012: 28-10).

¹²⁴ Terblanche (2007:377).

¹²⁵ De Toit (2012: 28-51).

¹²⁶ NPA's (2012) *Annual 2012 Performance Plan*, subsection 4.1(3)). It is important to note that the NPA has only four (4) strategic indicators in their annual strategic plan in relation to

both the compensatory objectives of forfeiture provisions, and forfeitures' connection to prosecutorial processes, which is a key focus of this thesis.

Finally, it is important to note that civil forfeiture orders are executed by state officials, as the state is the sole Applicant. Therefore victims do not sustain any costs or inconveniences when trying to obtain moneys from forfeited property as they may request funds derived from preserved/forfeited assets from the court informally without engaging in a civil suit themselves. Further, because the state executes the forfeited assets under its own mandate and with its own resources, no further execution processes are required by the victim such as garnishment orders or discoveries to ascertain if the respondent is solvent. In this regard, difficulties can occur when victims try to execute civil orders/judgments, as previously noted in relation to above discussion on section 300 CPA orders, and forfeiture orders do away with execution obstacles as assets are sequestered and executed upon forfeiture via State efforts. Once again, the same cannot be said for civil judgments for delict or negligence where execution can be a serious problem when plaintiffs attempt to realize judgments and defendants resist.¹²⁷

"improve[ing] justice services for victims of crime' and one (1) of these four (4) benchmarks is compensation provided to victims via POCA provisions.

¹²⁷ For example see the case of *Esme van Zijl and Imker Marais Hoogenhout* (25 May 2006) Cape of Good Hope Provincial Division- High Court, Case no 9253/99 which confirms the difficulties involved in the execution of a civil judgment involving sexual violence when a offender claims to be judgment proof.

Also, as an aside, this matter is also significant as it clarified issues surrounding the statute of limitations in civil matters and the discovery of damages thereto when these issues were reviewed at the Supreme Court of Appeal (see *Van Zijl v Hoogenhout* [2004] 4 All SA 427 (SCA)).

With this in mind, by way of a review of file documents obtained from the court register, below are the steps that the victim/plaintiff undertook to try to enforce a civil judgment.

- (i) An unreported judgment was first delivered in the case of *Esme van Zijl and Imker Marais Hoogenhout* (25 May 2006) Case no 9253/99 which awarded damages due to the rape and sodomy of the victim for over seven years. The court ordered R450 000 to the victim (and interest from 19 August 1999) and costs of the suit on an attorney and client scale.
- (ii) Thereafter in letters dated 12/05/2006 (as found in the court file) from the judgment debtor's lawyer, W A Barnard, the following was confirmed: we once again place on record that our client has no further assets having cashed in all his investments and having loaned some R300 000 plus from his wife.

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- (iii) Thereafter in letters dated 12/07/2006 and 23/08/2006 (as found in the court file) from the victim's financial investigator, T Taljaard of Brooke International, the following was confirmed: [we were asked] to ascertain whether Mr. Hoogenhout has any assets or whether there were any changes with his finance portfolio [and] an all bank search was done in 2005 and it showed that Mr. Hoogenhout was the holder of three accounts... [and] two accounts of Mr. Hoogenhout are in his wife's name.... we suggest to you to apply for bank statements from the date the accounts changed from husband to wife... we also await a quote for any shares or policies that Mr. Hoogenhout might have... Mr. Hoogenhout worked most of his life and [has] got no assets registered in his name [while] Mrs. Hoogenhout never worked and [has] got immoveable and moveable assets as well as healthy bank balances.... in conclusion we are of the opinion that when this can of worms was opened by our client, Mr. Hoogenhout started to transfer his assets to his spouse in order to plead poverty should he be found guilty of the charges against him"
- (iv) Thereafter in a letter dated 31/08/2006 (as found in the court file) from the judgment debtor's lawyer W A Barnard the following was confirmed: "[the judgment debtor] respectfully abides by the Court's decision and has instructed us to place the following on record... he has no means to settle any judgment amount as he owns no property immovable or movable and has no funds or deposit accounts or investments [and] this matter has costs our client, conservatively R500 000 most of which he has had to borrow from his wife to whom he is married out of community of property [and] we believe that whatever monetary judgment is finally granted against him will be met with a nulla bona return."
- (v) Thereafter in an affidavit of the victim dated 6/12/2006 (as found in the court file) supporting a sequestration of the judgment debtor's estate, the following was confirmed: that "the Respondent [judgment debtor] has previously made substantial and regular deposits to this wife with the intent of prejudicing me, in my capacity as his judgment creditor... it appears from the substantial income declared by the Respondent for the past three years and from forensic investigations arranged by my attorneys that there is a very real prospect that a substantial number of the Respondent's assets remain undisclosed and/or intentionally concealed by the Respondent.... the appointment of a trustee will ensure the recovery of any assets that have been concealed and/or unduly disposed of and will allow these assets to be brought back into the estate... such a process will generate a valuable pool of assets which will provide an ample resources for the payment of any costs associated with the sequestration... lastly the appointment of a trustee will bring an end to the Respondent's unlawful disposal of his assets and will facilitate an independent and through investigation of all the assets and liabilities of the estate through the utilization of the extensive powers afforded by the [Insolvency] Act [24 of 1936].... I shall cause sufficient security to be furnished to the Master of the above Honourable Court for the payment of all fees and charges necessary for the prosecution of the sequestration proceedings and of all costs of administering the insolvent estate until a trustee has been appointed, and if no trustee is appointed, of all fees and charges necessary for the discharge of the deceased estate from sequestration."
- (vi) Thereafter, on 08/12/2006, the victim lodged R20 000 bond "in case the [victim] shall fail when required by the said Master to pay all fees and charges necessary for the prosecution of all sequestration proceedings and of all costs of administering the estate.
- (vii) Thereafter, a provisional sequestration order was obtained in the High Court (Cape of Good Hope Provincial Division) on 12 December 2006, case number 13473/06, involving the victim and the judgment debtor's wife.

1.4 Methodology

This thesis ascertains the efficacy of South African compensatory criminal processes, in sexual violence matters, by way of two well established research methodologies; firstly by way of standard legal analysis (by reviewing constitutional precepts, legislation, policies and case law), and secondly, by way of empirical evidence (namely a review of new findings from interviews, case studies and surveys). These research methods were undertaken to prove this thesis' hypothesis which suggests that gender bias is a factor that prevents the provision of compensation to victims of sexual violence in criminal sentencing dispositions, and in quasi-criminal civil forfeiture proceedings, thus leading to a discriminatory outcome.

This methodology section will include the following:

- First, a general discussion on how the research undertaken for this thesis, namely text based legal research and new empirical research, work together to further the hypothesis;
- Second, a review of precedent methodological approaches will take place, namely, feminist social science research, feminist legal research and research based on critical legal theories. These precedent approaches analyze gender concerns and employ socio-legal research techniques;
- Third, each research practice, namely text based legal research, interviews, surveys and case studies, will be canvassed separately, focusing on processes undertaken, ethics concerns and weaknesses and strengths of each approach;
- Finally, a more nuanced review of action research methods will take place, as this practice was employed within the case studies.

To begin, this thesis combined legal research, via legal texts, with an analysis of empirical data from interviews, case studies and surveys. These two broad approaches were weaved together as the legal analysis provided an important foundational base, or bridge, into the main thrust of this thesis, namely the empirical research that contextualizes the harm caused to sexual violence victims when they try to access criminal courts, and post assault services, but are unable to do so on account of economic barriers that could have been easily remedied by way of state or offender compensation.

Legal texts are reviewed first in this thesis, in Chapters Two to Six, followed by an analysis of the application of the law in practice in Chapters Seven to Ten. In this regard, the legal analysis provides a review of law as a source of normative power which gains its authority from case law and statutes (and to a lesser degree international human rights conventions),¹²⁸ while the new empirical evidence undertaken in this thesis questions, and distills, role-players' beliefs and discretionary practices, in relation to sexual violence cases, to ascertain how the law exists in practice.¹²⁹ Put another way the legal analysis employed in this thesis first reviews the law, and legal principles, as defined in statute and case law (i.e. how provisions in the Constitution and the CPA and POCA are interpreted by the courts and thus how they should be practiced by criminal justice role-players), while the new empirical research put forth in this thesis thereafter seeks to deconstruct¹³⁰ the law by dismantling it, questioning its

¹²⁸ Albertyn (2005:220) where it is noted that "law has a practical and normative power (and) inter alia, this has been the power to include or exclude, to determine who has access to rights and resources and who falls within the boundaries of social and economic recognition/affirmation or beyond them in processes of exclusion, stigmatization and marginalization."

¹²⁹ Albertyn (2005:220) also notes that for law to "transform" scholarship must "also address the normative and conceptual underpinnings of the law, as well as its application and practice."

¹³⁰ Deconstructing law and legal processes is important, as noted by Albertyn (2005:219), when she states that "a strong critique of the law is thus combined with a recognition of law as a site of power and an arena of struggle [because] the law is an imperfect and even hostile tool, but it is a terrain that cannot be ignored."

normative authority and value ¹³¹, and then analyzing its contextual applications, and how law is actually applied by prosecutors, state attorneys and judges. More specifically, victim surveys contextualize the gendered economic needs of sexual violence victims, post assault, so they can be compared to the compensatory practices and beliefs of prosecutors and judges, as confirmed via interviews and case studies. Furthermore, case studies, which encapsulate action research methods, also uncover the ‘mechanics’ of the law, by delving into discretionary court processes, by reviewing court files and through interacting with role-players.

Regarding the scholarly disciplines that informed this work, there are three disciplines that must be acknowledged as precedent methodological approaches/theories and this thesis is influenced by each of these strains as noted.

The first scholarly sphere that reviews legal texts and thereafter how the law is applied in practice, in relation to gender issues, are social sciences disciplines that delve into feminist research. It is important to note that feminist researchers in the social sciences regularly employ “methods, theories and epistemologies that are not inherently feminist [and these] raise an interesting question regarding how distinct feminist research is, or should be, from conventional social science scholarship.” ¹³² With this in mind, this thesis also engages standard empirical research methods that are found throughout the social science disciplines

¹³¹ Kirchengast (2010:88) confirms that at present, in common law jurisprudence, there is a “normative theory of the [criminal] trial” which suggests that the trial is a “means by which defendant’s rights are protected *a priori* despite recognizing that the trial involves a communicative process between participants [and that] this normative perspective significantly privileges the defendant.” Moreover he notes, at 86, that “the positioning of victims’ rights alongside those of the accused will continue to be excluded so long as the criminal process is constituted within a normative framework that positions the trial around the interests of the defendants...[and instead] the criminal process ought to be viewed discursively as a changeable, elastic and inclusive forum through which various perspectives and interests come to be valued.”

¹³² O’Shaughnessy et al (2012:515). Also note that O’Shaughnessy et al, at 494, confirm their conclusions about the use of standard social science methodologies by feminist scholars, were substantiated by “a study that systematically explores the state of feminist qualitative research today [from 1998 to 2008 with a sample of 2 269 feminist journal articles]through a content analysis of recent academic feminist literature in the social sciences.”

(namely surveys, case studies and interviews) but while doing so it also acknowledges the special role of feminist epistemology thereto. More specifically, the general research approach in this thesis can be said to dovetail feminist research epistemological approaches as it is a well-established feminist research practice to “attend not only to the outcomes of their research but also to the processes that lead to knowledge construction [as] feminist often assert that the ways in which knowledge is constructed deeply affect research and, subsequently, what is “know”.”¹³³

This thesis follows the above approach by letting victims recite their own concerns directly via surveys in Chapter eight thus expanding the knowledge construction process (so that state role-players viewpoints are not the only source of empirical information reviewed). Also note, in the case study in subsection 7.2.6, processes that lead to knowledge construction were also carefully reviewed and examined. More specifically, this thesis employed an action research component within this case study: firstly, to uncover how state attorneys use their discretion in civil forfeiture proceeding to help victims or to obstruct victims; secondly, to rebut the presumptions of gender neutrality put forth in the state attorneys’ statutory interpretations; and thirdly, to second-guess the state attorneys’ procedural decisions in a *sub-judice* court proceeding so as to test discriminatory positions in real time, within ongoing legal proceedings. It can be said that this epistemological approach provided powerful insights that may have been lost if questions relating to bias and discrimination were posed to role-players retrospectively and post adjudication. Furthermore without employing this specific ‘knowledge construction process’, it would have been difficult to label the actions of state role-players as being biased and discriminatory as the state attorneys in question could lay blame elsewhere post adjudication. With the above in mind the processes described at the end of this methodology subsection, in relation to the case study in subsection 7.2.6, were as important as the findings, or ‘outcomes’, of the case study in question.

¹³³ Ropers-Huilman (2011:670)

The second academic discipline that regularly reviews law, and its gendered practice, is feminist legal scholarship in law schools. In this regard, Katharine Barlett has provided a useful definition of feminist legal scholarship, namely: “scholarship [at law schools that is] aimed at critically describing the relationship between gender and law [or] prescribing how that relationship might be improved.”¹³⁴ Also, Barlett confirms that there is an “interactive relationship in feminist legal scholarship between scholarship and practice [and] this relationship has been described as dialectical, meaning that each feeds and helps redirect the other [as] feminist scholarship has built importantly and inextricably on direct engagement and experience with the law itself.”¹³⁵

As noted above in the explanations of the ‘knowledge construction processes’ in relation to feminist social science research, this thesis also involved “direct engagement and experience with the law itself” via the case studies (and the action research techniques thereto as described at the end of this subsection) and via interviews with criminal justice role-players. Once again, as noted above with feminist research in the social sciences, and as confirmed by Barlett “much of today’s legal scholarship, including scholarship that does not identify explicitly as feminist, accepts that gender privilege is often invisibly embedded in the rule of law [and] as a result, while feminist scholarship is arguably more influential than it once was, it is also less distinctive.”¹³⁶ Nonetheless, it can be said that feminist legal scholarship has been an important contributor to debates in South Africa on how the law works in word and in practice to disenfranchise women and girls. More specifically, C Albertyn confirms that “feminist legal activists [in South Africa]” have used legal discourse to “redraw these boundaries of inclusion and exclusion (in practical and normative terms)”¹³⁷ and as such “[in South Africa] a strong critique of law is thus combined with recognition of law as a site of power

¹³⁴ Barlett (2012: 382)

¹³⁵ Barlett (2012: 429)

¹³⁶ Barlett (2012: 427).

¹³⁷ Albertyn (2005: 220).

and an arena of struggle.”¹³⁸ This thesis takes the above approach, when discerning discrimination and bias in the South African criminal justice system as this thesis assesses the law in both “practical and normative terms”, via case studies, victim surveys and interviews that question “law as a site of power and a arena of struggle” and secondly when comparing legal texts and constitutional imperatives in order to locate normative obligations.

Finally, the third academic sphere that reviews law, and its actual gendered practice via contextual practices, are scholars that identify themselves as critical legal theorists. In this regard Elizabeth Comack and Gillian Balfour confirm that critical legal theorists suggest that “law is far from being an impartial and objective enterprise [as] law deals in ideology and discourse – through the meanings and assumptions embedded in the language that it uses, through its ways of making sense of the world and through its corresponding practices.”¹³⁹ Furthermore they note that critical legal theorists suggest that “while law’s concern is ostensibly with making judgments on legal matters (such as culpability, admissibility or reasonableness) there is more at work... [as legal processes] also involves making judgments on the legal subjects themselves, in terms not only of what they have done, but also of who they are, and on the social settings or spaces in which they move.”¹⁴⁰ Therefore Comack and Balfour confirm that critical legal theorists suggest that “law is not just a set of rules and procedures but a process that entails gendering, racializing and classing practices.”¹⁴¹

It can be said that the above-mentioned approach of critical legal theorists would likely be fully supported in South African law schools. In this regard legal commentator Geo Quinot confirms that in post-1994 South Africa, law schools must be open to wider sources of knowledge so that law can be contextualized.

¹³⁸ Albertyn (2005: 219).

¹³⁹ Comack and Balfour (2004:9).

¹⁴⁰ Ibid.

¹⁴¹ Comack and Balfour (2004:10).

In this regard Quinot confirms that “the new constitutional dispensation calls for a substantive mode of legal reasoning... [and] an understanding of law as a phenomenon that is socially constructed and situated.”¹⁴² This thesis partly follows this precedent approach, and Quinot’s suggestions, as it seeks to analyze law not only from legal texts and judgments themselves but also by way of empirical methods that can discern “gendering, racializing and classing practices” via “social constructions” that have embedded themselves within court processes.

Turning to the methodological practices employed in this thesis it is helpful to begin with a review of the legal (text based) research undertaken. In this regard, the author reviewed case law, legislation, constitutional and international human rights precepts, academic publications and policy documents to ascertain the current obligations of state role-players in relation to the facilitation of compensatory provisions and processes. Regarding case law, legal analysis is guided by precedent so a review of reported case law in the South African Criminal Law Reports (SACR) was undertaken up to February 2013 (namely Volume 1, February, 2013).

Furthermore, unreported court judgments (as opposed to reported case law as found in published law reports¹⁴³) were also reviewed in this thesis and this was necessary as there was an absence of reported case law on sexual violence matters for which compensatory orders were given in the Regional and High Courts. Most of this unreported case law is reviewed in the case studies in Chapter Seven but one can still find unreported judgments throughout this thesis.

¹⁴² Quinot (2012:415 and 417).

¹⁴³ It is a well-established principle of common law that unreported decisions are of equal precedent as those of reported decisions. Reported judgments are found in Law Reporters while unreported judgments must be obtained from the clerk of the court or by referral from colleagues. More specifically, to cite some variations that adhere to common law precedents, an unreported appellate court judgment has greater weight than a reported judgment of a lower court; furthermore a reported or unreported decision of the same court also holds the same weight. With the above in mind underexposed and unreported judgments were required to ascertain how laws were most often being applied by courts irrespective of their placement in Law Reporters.

The author visited prosecutors at various High Courts and Sexual Offences Courts throughout Cape Town (which sit at the Regional Court level) and requested court case file numbers in order to locate possible subjects for the 'case studies' reviewed in Chapter Seven.¹⁴⁴ In this regard, the author sought unreported cases wherein sexual violence victims were provided with compensation, via forfeiture proceedings, correctional supervision orders or suspended sentences as the author was not able to locate reported case law on this point.¹⁴⁵

With regard to the empirical evidence three (3) original research data sets are reviewed in this thesis, as follows:

- First, twenty-seven (27) interviews with criminal justice role-players were undertaken;
- Second, forty-seven (47) complainant surveys were administered and analyzed;
- Lastly, eight (8) court file case studies were analyzed. The cases were identified and chosen by way of prosecutorial referral or through media reports. In some of the cases action research was employed.

The practical underpinnings of these data sets are reviewed in great detail in Part Five, Chapters Seven and Eight, in the relevant subsections that deal with interviews, case studies and victim surveys, as this better equips the reader with

¹⁴⁴ After being provided with court file numbers from prosecutors for relevant cases the author obtained the paper court files from the court register's office. This allowed the author to locate precedent unreported judgments wherein sexual violence victims were provided with compensation, via correctional service conditions or suspended sentences (namely, Case Study One and Two, in subsections 7.2.1 and 7.2.2).

¹⁴⁵ Note that *S v Thabethe* 2009 (2) SACR 62 (T), as mentioned previously in this thesis in subsection 1.3 in relation to restorative justice, is the only reported case that the author could locate wherein correctional supervision was used to provide compensation to a sexual violence victim but this judgment was overturned on appeal (*Director of Public Prosecutions v Thabethe* 2011 (2) SACR 567 (SCA)).

important background prior to delving into the actual empirical findings. With this in mind, only a brief review is set in this introductory methodology section. As background, the data sets were all completed between 2005 to 2008 in Cape Town's High Court and Regional Courts (including the Sexual Offences Courts), and in the informal settlements and townships outside of the city centre. Furthermore, Cape Town was chosen as the research location for the empirical research because its courts are amongst the best resourced in South Africa and issues concerning resource allocation are not as pressing as in other regions.¹⁴⁶ Also, the author was enrolled at the University of Cape Town.

It is important to mention that the three (3) data sources referenced above were combined by way of a triangle approach with information being drawn from each source simultaneously so that not one source superseded, or was dependent on, the others.¹⁴⁷ In addition, each of the data sources provided different insights from different criminal justice role-players. More specifically, the interview data set provided insights on what compensatory practices, both formal and informal, in cases of sexual violence and non-sexual violence, were deemed permissible in the eyes of prosecutors, judges and customary community leaders. Secondly, the case studies data set, by way of court document reviews and discussions with role-players, provided insights into what compensatory practices were deemed acceptable in the eyes of correctional officials, prosecutors and judges, within sentencing proceedings, and what compensatory practices were deemed acceptable in the eyes of, state attorneys (as instructed by NPA prosecutors) in forfeiture proceedings. Finally, the victim survey data set provided insights into what compensatory practices were preferred by the victims. All of these data

¹⁴⁶ In the Western Cape, and in Cape Town, court administration and prosecutorial services are amongst the best resourced and managed in South Africa. Therefore victim assistance should be amongst the best in South Africa. In this regard, the Western Cape's Budget is the third highest in South Africa as confirmed in the NPA's (2011:3) *Khasho Newsletter*.

¹⁴⁷ Another example of a triangle approach in gender violence research can be found in Comack and Balfour (2004:184) wherein interviews were conducted with court role-players, court files were reviewed and finally a series of 'mock police reports involving four different types of crime categories' were used to question court role-players on their views regarding gender inequalities.

sets, individually and collectively, suggested that biases existed and was often an important factor in role-players decision making processes. The data sets confirmed that prosecutors and magistrates had abundant discretion to facilitate compensation reviews but this discretion was rarely used in sexual violence cases partly due to unfounded and biased beliefs about sexual violence complainants and their gendered economic victimization losses (namely the incorrect suppositions that sexual violence victims did not want or need compensation and that their economic losses were not quantifiable).¹⁴⁸

Regarding each of the original empirical research sources employed in this thesis, the below comments explain why each method was undertaken and how they individually helped to prove the thesis hypothesis. Ethical issues are also briefly canvassed along with a review of the weaknesses and strengths of each approach.

The first empirical research practice that was employed in this thesis was structured and unstructured interviews. In this regard interviews were undertaken with a High Court Judge, Commercial Crime Court Prosecutors, Sexual Offences Court Prosecutors and Magistrates, Correctional Supervision Officers, Defense Lawyers and informal community role-players (see interview schedule and structured questionnaire in Appendix 1). The interview processes sought to compare compensatory practices in sexual violence cases and non-sexual cases so that discrepancies in treatment could be noted and actual practice discerned. Further, in order to ascertain if biases existed, the interviews reviewed court role-players' beliefs on the general economic losses of victims of sexual violence and the role of the criminal courts in addressing these unique gendered losses.

¹⁴⁸ Comack and Balfour (2004:184) note that 'in combination, the information obtained from a content analysis of Crown Attorney files [in Canada] and in-depth interviews with defense lawyers allows us to explore lawyers' strategies... to reveal how lawyer's negotiate their roles and strategies within a framework of procedural fairness, as well as the extent to which the prevailing socio-political context and discursive construction based on gender, race and class inform their case building work.'

Regarding ethical considerations in relation to the interview process:

- All participants were advised that their statements would be anonymous and they would not be identified thus improving chances of candid and thoughtful response;
- Approval was obtained from the National Prosecuting Authority and the Provincial Regional Court President to conduct interviews with prosecutors and magistrates for the structured interviews (and for non-structured interviews if required);
- Prior approval to interview informal community role players was given by the UCT Law Faculty Ethics Committee and it was confirmed that there would be no obligation to report suspected or confirmed ongoing incidences of crime.¹⁴⁹ The author was not provided with direct names or

¹⁴⁹ In an email dated 7 March 2006 to University of Cape Town (UCT) Faculty of Law the author inquired as follows: "I will be conducting interviews with community leaders regarding the informal practice of mediating sexual assault matters without the assistance of police or prosecution personnel.... If a community leader discloses a case of sexual assault am I bound to report the incident to the authorities if this has not been done? I believe that I do not fall under the below reporting provisions in the Prevention of Family Violence Act 133 of 1993 and the Child Care Act 74 of 1983."

In an email dated 22 March 2006 the author was informed by UCT Faculty of Law: "there is no general legal duty to report crime on the part of an ordinary person although there may be exceptions e.g. where the person is a police officer or required to report under statute. You do not appear to fall into these exceptional categories. I agree with your conclusions that you would not appear to fall under the domestic violence or child care legislation. So, leaving aside moral obligations, I don't think you would be legally obliged to report the possible commission of a crime to the authorities."

The above summation is consistent with Sloth-Nielsen (2012) and her review in 'Obligations to report commission of sexual offences against children or persons who are mentally disabled'. In this regard at 18-4 she confirms that the Children's Act contemplates two reporting categories: professionals who in the course of their work deal with children as obligated reporters, and so called 'community reporters' (i.e. members of the general public) who may report a belief that a child is in need of protection, but are not compelled to." Furthermore, after the empirical research was completed in this thesis, the Criminal Law (Sexual Offences and Related Matters) Amendment Act (SORMA) came into force, which has broader reporting requirements. More specifically Sloth-Nielsen confirms, at 18-5, that "the reporting provision in SORMA [in subsection 56(5) in relation to children and persons with disabilities] places the duty to report upon 'a person' which appears to abode of no exception... and this blanket approach by the legislature may raise anomalies. In this regard, at 18-10 and 18-11, the following is noted: "mandatory reporting requirements [in SORMA] are set to lead to a myriad of ethical challenges, at a practical level...[as] researcher[s] would be compelled to disclose any violation of SORMA emerging during the research process... moreover the legal compulsion to report this would have to be revealed to any research subjects... [as there is a] threat of criminal sanctions [for not reporting]."

made aware of a specific case of ongoing sexual violence, as a result of the interviews, so the reporting issue did not present itself.

Regarding weaknesses of the interview process:

- As noted by Mats Alvesson:

“...there are some serious problems with interviews that cannot really be avoided through the use of techniques aiming to make interview work as rational as possible. There are always sources of influence in an interview context that cannot be minimized or controlled... This is partly the case because the statements are liable to be determined by the situation, i.e. they are related to the interview context rather than to any other specific "experiential reality", and partly because they are affected by the available cultural scripts about how one should normally express oneself on particular topics.”¹⁵⁰

The present research also had to deal with the above problem and the following mechanisms /strategies, listed below, were used to address this weakness;

- Structured and unstructured interviews were completed with judges and prosecutors in their court offices thus ensuring the participants maintained their professional distance from the subject matter. This can be compared to the informal interviews held with community leaders, as one interview took place in a home in a township, while another interview occurred at a place of employment that was not related to the information sought in the interview. With this in mind the findings from these community member interviews, as found in subsection 7.1.2, must be read with caution;
- All participants were told that their statements would be anonymous and they would not be identified thus improving chances of candid and thoughtful response;
- When structured interviews were held with prosecutors and judges (the large majority of interviews undertaken for this thesis) they were notified that all participants were answering the same set of questions and objectivity was important. In this regard, prior to the interview each

¹⁵⁰ Alvesson (2003:166)

participant was given a list of written interview questions along with a written statement of confirmation of anonymity.

Regarding strengths of the interview process:

- Interviews with prosecutors and judges allowed the researcher to understand and analyze professional biases, which is not publically acknowledged in official statements, records or publications;
- Interviews were conducted in a sound methodological manner (see detailed information on procedural matters relating to interviews in subsection 7.1).

The second empirical research practice that was employed in this thesis was complainant surveys (see survey template in Appendix 3, with the informed consent information thereto, along with a full survey methodological review in subsection 8.2, and survey findings in subsection 8.3 to 8.6 and Appendix 3). Surveys were undertaken to assess the following: the compensatory needs and preferences of sexual violence victims in South Africa in relation to their post assault economic losses; victims' concerns about compensatory cultural obligations; and finally the financial losses incurred by victims' when interacting with the criminal justice system. Also note that victims' views on offenders' general ability to pay compensation was also analyzed.

Regarding ethical considerations in relation to the survey process:

- A detailed review of the survey administrative is undertaken in chapter 8. The review confirms that: ethics approvals were obtained; expert rape counselors (who spoke different languages) were retained to assist so the author did not contact victims directly; informed consent processes were followed; and selection of participants was done via expert rape counselors and voluntariness was stressed;
- Approval was obtained from the NPA and UCT's Faculty of Law's Ethics Committee to conduct a survey with victims of sexual violence.

Regarding weaknesses and strengths of the survey process:

- A small sample was undertaken (47 victims were surveyed) and there were concerns with the neutrality of survey participants (as noted previously in relation to the weaknesses in the interview process);
- The foregoing limitations were mitigated using research techniques suggested by L Davis et al. in their article 'The Value of Qualitative Methodology in Criminological Research'¹⁵¹ which retrospectively critiqued the research practices of a marital rapes study that employed a 'purposive theoretical sampling method... one-on-one, in-depth, semi-structured interviews... [and] open-ended questions.'¹⁵² The marital rapes study's goals, which were similar to the survey goals in this thesis, '... [were] to reduce... the experiences [of the marital rapes' survivors] to a brief description that typified the experiences of all the participants in the study.'¹⁵³

To ensure that the qualitative data was reliable, the marital rapes study researchers, and the author of this thesis, were guided by similar research principles or guidelines. In this regard the foregoing methodological priorities were noted in the marital rape study and these principles were identical to the priorities of the research undertaken for this thesis:

'[the research] attempted to substantiate the accuracy of their accounts and ensure consistency (whether the findings would be consistent if the enquiry was replicated with the same subjects), neutrality (whether the findings are a function of the informants and not the researcher), credibility (that the research was conducted in such a manner as to ensure that the phenomena was accurately identified and described) as well as confirmability (whether the results of the research could be confirmed by another).'¹⁵⁴

¹⁵¹ Davis and Klopper (2003: 72).

¹⁵² Davis and Klopper (2003: 73-74).

¹⁵³ Davis and Klopper (2003: 74).

¹⁵⁴ Davis and Klopper (2003: 74).

The marital rape study researchers accomplished the foregoing by employing multiple procedures such as:

'prolonged engagement and persistent observation... ; triangulation... ; structural corroboration... [via] multiple types of data to support or contradict the interpretation... [and] negative case analysis [to deal with credibility problems or disconfirming evidence]... ; transcription double checking... ; coding of data... ; peer review... ; [use of academic] internal and external examiners; [and ensuring researchers applied] critical subjectivity.'¹⁵⁵

The survey processes undertaken for this dissertation also followed the above best practice procedures by way of the following methods:

- The author engaged trained rape counselors, and other social work professionals, to administer a survey to forty-seven (47) sexual violence complainants thus ensuring prolonged engagement and persistent observation;
- The author engaged in triangulation, negative and positive corroboration, and the use of multiple types of data by comparing the survey results and conclusions to those of a South African Law Reform Commission Discussion Paper on victim economic loss. In addition, results of the survey were compared against international literature and studies and other research data obtained in this thesis;
- The author used a conservative approach when tabulating the participants' estimated Rand expenditure by using the lowest discernible figures when illegible handwriting and variable interpretations of data were present, and by noting fewer appointments to service providers, or criminal justice officials, when there was ambiguity in a victim's answer. This method was undertaken as the goal of the survey was to ascertain the participants' expectations in relation to their perceived compensation needs, rather than to ascertain exact Rand expenditure figures for quantitative purposes or for health economics purposes;

¹⁵⁵ Davis and Klopper (2003: 74-75).

- The author double-checked his tabulations and coding of data;
- The survey methodology and results were reviewed by the author's Faculty of Law supervisor at the University of Cape Town and the survey results were peer reviewed at the Victim Empowerment Programme, 10th Anniversary Conference on 19 August 2008 in Durban when the author presented his findings;
- The Survey findings were provided to all administrative partners (namely entities who assisted with administering the survey, mostly in isiXhosa) such as Rape Crisis Cape Town.

With regard to the last of the empirical data sources employed in this thesis, eight (8) court files were retrieved from the court clerk's office and then analyzed by way of separate court file case studies (see Case Study Table in subsection 7.2). Compensatory practices involved in sexual violence cases were compared to non-sexual violence cases and discrepancies and actual practice were discerned. Furthermore, perspectives from a wider range of criminal justice role-players were made available by reviewing court transcripts, round-table discussions, and extensive offender and victim court reports which provided insights from many criminal justice role-players. In this regard, viewpoints from social workers, defense lawyers, corrections officials, and dependants of complainants and offenders, were also analyzed.

Regarding ethical considerations in relation to the case study process:

- Most of the case studies involved paper reviews of public court files, followed by brief interviews with prosecutors in their court offices, to better contextualize the paper court file (this practice was deviated on two occasions – in one case study a roundtable discussion occurred with a prosecutor and defense lawyer (Case Study Three in subsection 7.2.3) and in another case interventions in a *sub-judice* civil forfeiture court case took place (Case Study Six in subsection 7.2.6));
- Written approval was obtained from the National Prosecuting Authority to generally engage with prosecutors on barriers to justice concerns and to

- involve the author-researcher in the pending *sub-judice* civil forfeiture court matter;
- Court files are in the public domain but the author still redacted all personal/identification information in the court files when discussing the same with criminal justice role-players;
 - When interviews took place for case study purposes, all participants were told that their statements would be anonymous and they would not be unnecessarily identified thus improving chances of candid and thoughtful responses;

Regarding strengths of the case study process:

- All case studies involved a document review of actual court files so verifications could take place;
- Selection of case studies, although dependent on referrals and the media, was based on objective criteria, namely the cases were chosen where a compensatory processes outlined in subsection 1.1 was employed;
- The case studies also benefited from sidebar information from prosecutors and state attorneys (and in one occasion from a defense attorney) that could be used to interpret, and better analyze, court records;

In the court file case study reviews, as mentioned above, action research was utilized to enrich this thesis's review of discrimination in the criminal justice system. Action research, as defined by P Reason and H Bradbury, is a "...democratic process concerned with developing practical knowing in the pursuit of worthwhile human purposes, grounded in a participatory world view..."¹⁵⁶ It is asserted that the democratic underpinnings in this definition are of significance as this points to the agency of the researcher, and his or her active citizenship, which allows for the questioning of government institutions, like the NPA, which in turn is a cornerstone of democratic governance.

¹⁵⁶ Reason and Bradbury (2001:5).

Margaret Abraham et al. note that “action-oriented research usually depends on interpretive rather than positivist epistemological roots... [as] action-oriented research[ers] have challenged positivistic epistemologies which hold that the way we conduct research and produce knowledge must be objective and value free to be credible.”¹⁵⁷ In this regard, it can be said that the action research undertaken in this thesis is well suited to the court based subject matter of this work as the author originally supposed that defense lawyers, prosecutors magistrates and state attorneys were coming to court with value based assumptions that were partly informed by biases, when dealing with compensatory processes. Thereafter, the author employed action research methods, by becoming an observer-participant in both a *sub judice* court case and in a post adjudication round table discussion so as to discern biases (and discriminatory outcomes), while also seeking objective evidence to back up his assumptions (namely government position statements and court record verifications).

While taking into consideration the broad definitions of action research above it is also important to note a vital distinction. More specifically, academics suggest that there is a difference between “participatory research”, that involves interested persons for whom the research seeks to serve, as opposed to “action research”, that is solely undertaken by individual scholars without consultations with affected persons or communities. In this regard, Abraham and Bandana confirm that “there has been some division between participatory research and action research [as] the former placed greater emphasis on the importance of grassroots participation and critical analysis [while] the latter paid more attention to action outcomes and relatively less to participatory processes.”¹⁵⁸

With the above in mind, the action research in this thesis is not firmly grounded in the ‘participatory research mode’, as it was conducted by an individual doctoral

¹⁵⁷ Abraham and Bandana (2012:126)

¹⁵⁸ Ibid. Also note Terre Blanche et al’s book, *Research in Practice; Applied Methods for Social Science* (2006) where the authors mention ‘participatory action research’ (PAR). In this regard, as confirmed by Bhana (2006), in Chapter 19 ‘Participatory Action Research: A practical guide for realistic radicals’, PAR requires collaborative research and consultations with affected communities and individuals in relation to the research design, implementation and findings.

student, without consulting an affected community, in relation to research designs or outputs. Regardless, the above delineations do blur at times, as the action research undertaken in this thesis also partook in critical analysis in addition to seeking outcomes. In addition, although there was no collaboration in the action research component of this thesis there was in depth stakeholder consultation in relation to the victim surveys wherein Rape Crisis was consulted on survey design, implementation and findings. With this in mind, it is important to place the action research that was completed for this thesis in perspective as one of many sources of information obtained for this thesis which obtains its value not only from the data and results obtained but also from its placement in the overall thesis methodology.

There are two examples of action research within this thesis. First, in Case Study Three, in subsection 7.2.3, a roundtable discussion was held with role-players, in a previously decided court case, to review a customary compensation payment that was arranged alongside a criminal sentencing proceeding. The author asserted that this customary arrangement severely prejudiced the child sexual violence complainant involved in the matter as the prosecutor and magistrate did not incorporate the customary financial settlement into the suspended sentence which could have also included a condition that the settlement money be placed in the Guardians Fund.¹⁵⁹ Instead, as the customary arrangement was not incorporated into the terms of the criminal sentence, the offender could easily default on payment without criminal sanction, or the offender could direct payment to the victim's patriarchal overseers (who negotiated the settlement on the victim's behalf) so that the money would not directly benefit the minor victim. Action research, via a round table discussion, was of assistance in this matter as this interactive mode of gathering empirical evidence provided the author with an opportunity to record how various role-players were able to align their interests to

¹⁵⁹ Note the case of *S v Salzwedel and Others* 2000 (1) SA 786 (SCA) wherein child dependents of a murdered victim were provided with compensation, via a suspended sentence, that was deposited into the Guardian's Fund. Also see subsection 6.1.3 regarding discussions on children's agency and the Guardians Fund.

the disadvantage of the victim on account of biases held. The round table discussions confirmed that the prosecutor and defense lawyer proceeded with the informal structure of the settlement, despite its discriminatory outcomes, by reinforcing each other's biases (as outlined in the Case Study in subsection 7.2.3). This is consistent with Joan Williams' suggestions that "women are disadvantaged not merely by a single rule or interpretation but by processes involving many different actors motivated by a variety of stereotypes of which they are barely conscious or blissfully unconscious... [and in these situations] women's disadvantage stems not from a single male norm kept in place by a single institution or actor, but rather from many people (women as well as men) acting in a decentralized way who are driven by (often unconscious) stereotypes."¹⁶⁰ Finally note that this example of action research employed interview techniques/practices and as such the previous comments above, in relation to interview ethics, strengths and weaknesses, apply.

The second example of action research in this thesis occurred in Case Study Six, in subsection 7.2.6, wherein the author intervened in a *sub judice* forfeiture court case by corresponding with the NPA and lodging a complaint with the Cape Law Society, against the State Attorney, to help discern biases, and discriminatory outcomes, in civil forfeiture proceedings. More specifically, the author, via the correspondence with the NPA and the Cape Law Society complaint process, sought to analyze an inequitable NPA position, that was employed in a *sub judice* court case involving sexually abused children, which dictated that only commercial crime victims could be provided with compensatory prosecutorial assistance in POCA proceedings and not victims of sexual violence. The author asserted that this position was inequitable and discriminatory as it exacerbated the disadvantages sexual violence victims face when seeking offender compensation and when attending to their post assault expenses (note the definition of discrimination is subsection 1.2).

¹⁶⁰ Williams (2000:216 to 217).

The author employed a “participatory democratic approach”, via its communications with the NPA and the Cape Law Society complaint process, as this provided him with an opportunity to directly question government decision makers to see if biases were partly responsible for the discriminatory NPA position mentioned above. With this in mind, during the complaint process the NPA did finally acknowledge that they had the discretion to partly assist the children in the forfeiture proceedings but they did not do so at first instance. This admission, along with two (2) other factual assertions, all of which were derived from action research, led the author to believe that biases were partly responsible for the prosecutorial inaction in this case. The other two factual assertions were as follows. First the NPA acknowledged that it had a longstanding policy of refusing to assist victims of sexual exploitation with their compensatory concerns, namely child victims that were forced to work in forfeited brothels, while they noted that they would assist commercial crime victims.¹⁶¹ Second, the NPA wrongly asserted in correspondence to the author that victims of sexual violence did not have quantifiable losses and the injuries of the children in question did not require extensive post-assault professional interventions.¹⁶²

¹⁶¹ This assertion is made taking into consideration the written admissions by the NPA, as contained in Appendix 2, which confirmed they have not assisted sexual violence victims in the past.

With this in mind, forfeiture provisions are often used to seize brothels wherein minor prostitutes are often located. For example, see *National Director of Public Prosecutions v Geyser* (160/2007) [2008] ZASCA 15 (25 March 2008). Also note Gould (2008: 23) who reports that she ‘encountered five sex workers under the age of 18 during the course of our research’ and ‘none were being forced by an adult to do so, but they were rather forced by circumstances, including dysfunctional families and poverty.’

Furthermore, POCA can also be used for trafficking matters and once again child victims have likely been involved in POCA proceedings in the past in relation to the child prostitution, for which compensation could have been of great assistance to victims. With this in mind, note a *Cape Argus Newspaper* story ‘Police Hail Victories over Trafficking’ (17 January 2011) wherein it was confirmed that “women [from Northern and Eastern Cape] were enticed by the promise of employment [in Cape Town but were forced into prostitution]... [and] they were aged between 14 and 45.”

With regards to the formal and informal assistance provided to solely to commercial crime victims in POCA proceedings see NPA correspondence in Appendix 2 and subsection 7.2.6 for the unreported Cape High Court decision of *State v Hoosain Mohamed* Case Number 35259/03.

¹⁶² NPA, Asset Forfeiture Unit (AFU), correspondence to Bryant Greenbaum (16 August 2006) on file with author. See letter in Appendix 2.

With the above in mind, despite the vulnerabilities of the child victims in question ¹⁶³, and the quantifiable losses they might have sustained as result of school interruptions and psycho-medical care ¹⁶⁴, the NPA in this case confirmed that, although in the past they had “made arrangements with victims who have suffered financial loss as a result of criminal activity to achieve some compensation for victims, however these cases are limited to situations where the loss is reasonably quantifiable...[and] it is unfortunately the view of the NPA that we are not in a position to pursue compensation for [the] victims.” ¹⁶⁵

In pursuing the action research practices in the above case study the following techniques were undertaken by the author and these techniques can be cited as strengths in the approach taken:

- Retrieving and copying the public court file;
- Questioning the conduct of the NPA by way of correspondence taking into consideration documentation in the court file;
- Rebutting NPA written replies by way of correspondence when their answers were deemed discriminatory;
- Attending court proceedings and informing prosecutors, State Attorneys and the Respondent’s counsel of the author’s concerns;
- Undertaking verbal discussions with court role-players during court recesses;

¹⁶³ Note the *Founding Affidavit of the Deputy Director of Public Prosecutions* Jacobus Abraham Niehaus, in NDPP and Werner Braun (In re: A silver BMW) (30 April 2010) High Court of South Africa (Western Cape High Court, Cape Town) Case Number 9313/10, at paragraphs 35 and 36 (which was commissioned for the final settlement for the forfeiture of a car wherein sexual violence occurred) which confirmed that “police officers investigating the criminal matter have traced 8 girls who alleged they were paid money to have carnal intercourse and/or perform immoral or indecent act with Braun, whilst they were under age 16...[and] the children involved are all from poverty stricken families and live in small, overcrowded dwellings... [and some] are pupils.”

¹⁶⁴ Ibid.

¹⁶⁵ NPA, Asset Forfeiture Unit (AFU), correspondence to Bryant Greenbaum (16 August 2006) on file with author. See letter in Appendix 2.

- Informing prosecutors, State Attorneys, the Respondent's counsel and *amicus* parties of the author's concerns by way of non-party correspondence;
- Requesting Members of Parliament (MPs) to assist by inquiring with the NPA on the pending court matter and asking MPs to report back on these discussions;
- Pursuing a Law Society complaint wherein the NPA conduct was reviewed and wherein voluminous submissions and rebuttals were exchanged thus providing new insights into NPA policy rationales, institutional blockages and legal positions as they relate to the rights of non-party complainants in civil forfeiture processes;
- Obtaining the High Court Registrar's approval to file various non-party documents in the forfeiture court file, in relation to the Law Society complaint against the State Attorney, so they were placed on court record.

The weaknesses in undertaking an approach based on action research became apparent to the author, and this may in part be due to the exploratory nature of action research (as defined earlier). In this regard, in relation to exploratory methodologies in general, Terre Blanche et al confirm that: "research methodology is one of the most fiercely debated fields in the social sciences today, and, rather than a single scientific orthodoxy, it is now characterized by a proliferation of radically divergent philosophies and techniques." ¹⁶⁶ More specifically, when conducting exploratory action research there is always a concern with maintaining distance from the research area and subjects themselves. As noted by Mats Alvesson "the problem of blind spots [can occur in close up participatory studies]... also the potential opposite problem of motivation coming from negative feelings' [can occur as well]." ¹⁶⁷ Alvesson also confirms that "being personally involved in the object of the study (the context in which one is studying) also means that one may be less able to liberate oneself from some

¹⁶⁶ Terre Blanche et al. (2006: vii).

¹⁶⁷ Alvesson (2003: 181)

taken for granted ideas or to view things in an open-minded way.¹⁶⁸ To imitate against these problems Alvesson suggests that researchers should “work systematically with a notion of reflexivity in which one tries to change the level of interpretation so that one’s favored interpretations in a first instance is the target of interpretation from a meta-level position, inspired by another standpoint.”¹⁶⁹ Other researchers have mitigated the risks inherent in action research by way of “commitment to peer engagement” and “dedication to validation processes.”¹⁷⁰

The author took heed of these precautions and the following steps were taken to ensure academic distance was safeguarded:

- Written approvals from the NPA were first obtained to intervene in the *sub-judice* case;
- The author ensured that his interventions did not favor a single party in the proceedings as this thesis did not deal with the substance of the forfeiture applications. In this regard, the author did not enter into debates on whether the properties in the *sub-judice* court matter should, or should not, be forfeited to the state as instrumentalities of crime but rather only sought to establish if certain assets could be excluded from the forfeiture regime, for the victims’ benefit;
- The research was completed for Doctoral studies under supervision, thus ensuring a certain degree of peer review;
- The author consulted with institutional role-players, such as the Cape Law Society¹⁷¹ and the NPA thus ensuring that the action research was properly informed;

¹⁶⁸ Alvesson (2003: 183)

¹⁶⁹ Alvesson (2003: 186).

¹⁷⁰ Marks (2012: 10 to 11).

¹⁷¹ Many Law Society complaints do not reach the investigation stage as they are summarily dismissed due to a lack of merit or jurisdictional issues. For example, the Cape Law Society dismissed a complaint which was filed by the Commission on Gender Equality, against several Defence Attorneys, in a *sub-judice*, criminal matter involving the murder of a lesbian in Khayelitsha. In this regard, in a Cape Law Society letter, dated 7 November 2008, to the Commission, on file with the author, it was confirmed that ‘if the court condoned twenty-two

- Reflexivity was regularly employed as the author was involved in a quasi-legal processes and as such had to prepare carefully and think strategically in relation to tribunal arguments, pleadings and professional obligations.

Finally with regards to ethics of the author's action research, the following is pertinent:

- There were ethical validation processes in place, in relation to UCT Faculty of Law's ethics approvals and yearly Faculty of Law MOUs;
- In the Cape Law Society complaint, and in all correspondence to court parties, the author identified himself as a Doctoral student who was acting in the public interest and that the author was unaware of the desires, wishes or predicaments of the child complainants as no contact had been made with them;
- The author ensured that the child complainants' rights were not prejudiced while acting in the public interest. In this regard, the child complainants and their parents were not pre-empted from asserting an interest in the preserved property irrespective of the author's actions;
- The author engaged in an open democratic process – namely attending court houses; retrieving public court files; making contact with the court parties in question after obtaining relevant approvals; and filing documents in a public court file with the court Registrar's approval;
- The possibility of coercive conduct or influences on the part of researcher due to power imbalances was not a concern. In this regard, the author, was an individual Doctoral student with no dedicated funding source, and he was confronting the NPA, a state body;
- Finally, the NPA encourages public engagement with forfeiture. Therefore the author was confident that his public involvement would be appropriate.

postponements...the society is not in position to investigate the matter any further as to do so would be interfering with the court process.'

With this in mind the Office of the National Director of Public Prosecutions has confirmed that 'the Asset Forfeiture Unit (AFU) settles disputes regularly and 'although settlements in civil matters are often kept confidential, the AFU has a policy of not doing so.' ¹⁷²

¹⁷² NPA (2009), *Media Statement* 'NPA Settlement with Schabir Shaik', issued on 22 January 2009 by the Office of the NDPP.

-PART TWO-
**SOUTH AFRICAN CONSTITUTIONAL
LAW**

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-CHAPTER TWO-

VICTIM COMPENSATION AND CONSTITUTIONAL IMPERATIVES

2. Introduction

The South African state has important Constitutional obligations that it must meet if it is to fully protect women and children from sexual violence. With regards to this thesis it is asserted that state and offender compensation has an important role to play in protecting women and children from sexual violence and ensuring their vulnerabilities are not heightened. For example, compensation, from offenders or the state, can make it possible for victims to move from a dangerous or abusive environment and thus escape repeat victimization. Also compensation can promote the reporting of crime, and lessen the attrition (or drop out) rates of victims who participate in the criminal justice system, and thus contributes to public safety in general. Finally compensation can assist with eliminating financial barriers victims of sexual violence face when they attempt to attend court and post assault medical services and thus it ensures that the vulnerabilities of these victims are not exacerbated.

With the foregoing in mind this chapter will first review constitutional provisions relating to equality and non-discrimination. Section 9(1) of the Constitution requires “equal protection and benefit of the law”¹⁷³ and this thesis suggests that although laws and policies are in place to assist victims of sexual violence with their compensatory concerns, these laws/policies are rarely canvassed for this vulnerable group while other ‘classes’ of victims in South Africa are provided with ample compensatory prosecutorial and judicial assistance, (namely commercial crime victims and violent crime victims in general). Bias is suggested as one of many factors leading to this discriminatory behavior because interviews and case studies undertaken for this thesis confirmed that state role-players did not assist victims of sexual violence with their compensatory concerns because they incorrectly believed that their financial

¹⁷³ Constitution, section 9(1).

losses were not quantifiable and/or sexual violence victims generally did not want, or need, compensation. Victim surveys in Chapter Eight rebutted these unfounded assumptions and confirmed that many sexual violence complainants were able to list quantifiable damages relating to both their court appearances and post-assault care, and that some of these victims would accept compensation from offenders, or the government, and that modest amounts of compensation would be useful to these victims.

A second constitutional concern was identified in the empirical research conducted for this thesis when it was confirmed that prosecutors, judges and state-attorneys “indirectly” worsened the vulnerabilities of victims of sexual violence, who are mostly females, by neglecting their substantive equality rights in contravention of section 9(2) and (3) of the Constitution (which requires the state to “promote” equality and to desist from “unfairly discriminat[ing]”).¹⁷⁴ This constitutional breach occurred indirectly as state role-players, applying gender neutral laws and policies, disadvantaged women sexual violence victims by way of inaction and omissions mainly on account of the gender biases canvassed above (which again wrongly suggested women sexual violence victims did not want or need compensation nor did they have quantifiable losses).

¹⁷⁴ Constitution, subsections 9(2) and (3).

Also note the discussions on substantive equality in subsection 1.2 of this thesis.

In addition, Albertyn and Goldblatt (2012:35-30) confirm that section 9(2) has been interpreted by the Constitutional Court to provide for a “substantive notion of equality” which requires the “dismantling... of systematic under-privilege” so as to “overcome a past characterized by deep social and economic inequalities, in which race, gender, and other patterns of exclusion and disadvantage structured access to, and enjoyment of, opportunities and benefits.”

Moreover, in the words of Mosenke J, in *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC), 2004 (11) BCLR 1125 (CC) at paragraph 27, “the substantive notion of equality recognizes that besides uneven race, class and gender attributes of our society, there are other levels and forms of differentiation and systematic under-privilege, which still persists [and] the Constitution enjoins us to dismantle them and to prevent the creation of new patterns of disadvantage.”

Finally note that Albertyn and Goldblatt (2012: 35-45 and 35-60 to 35-61) confirms that Constitutional Court jurisprudence suggest that subsection 9(3) “is capable of resulting in appropriate substantive equality analysis” although “a substantive interpretation of section 9 with regard to gender equality is not always understood or applied adequately by all of the judges of the Court.”

More specifically, research found that these biases worsened the existing vulnerabilities of women when they confronted the criminal justice system, and when they sought post-assault health services, as readily available avenues of compensation (including the SRDG, CPA and POCA provisions and customary arrangements) were pre-empted outright on account of gender biases and these compensatory sources could have helped victims address their dire post assault access to justice and health predicaments.

This second discriminatory outcome was not dependent on differential protection and benefit of the law, so it did not offend subsection 9(1) of the Constitution, as the first discriminatory outcome noted above does, but rather discrimination was caused by the unnecessary exacerbation of gender inequality for which the Constitution Court jurisprudence compels the state to act upon and “dismantle”.¹⁷⁵ In this regard, victims of sexual violence, who are mostly women, face unique financial obstacles in pursuing post-assault justice and health care and this thesis asserts that the lack of attention to their financial predicaments, despite laws and policy directives imploring them to fully canvass compensatory provisions, was discriminatory. Compensation could meaningfully help female victims and in this regard victim surveys in Chapter Eight confirmed that many victims did not avail themselves of free government psycho-medical services, nor did they fully engage the criminal justice system, on account of gendered economic barriers, such as concerns over child care costs or transportation expenses, that were clearly discriminatory in effect.

Although of paramount importance to victims, unfortunately these equality rights are difficult to address within criminal sentencing and forfeiture proceedings as prosecutorial and judicial discretion is a cornerstone of the criminal justice system (as is discussed in the next subsection), and courts provide a high degree of deference to government when adjudicating on policies and laws that

¹⁷⁵ Mosenke J, in *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC), 2004 (11) BCLR 1125 (CC) at paragraph 27.

touch upon the competing interests of persons in society (such as offenders' rights versus victims' rights) and budgetary/capacity constraints. In this regard, Fredman notes that "an examination of the cases [from Canada, England and South Africa] demonstrates that... courts are keen to protect the state from having to justify decisions which engage with substantive equality."¹⁷⁶ She confirms that "the court's role in applying substantive equality is then limited to scrutinizing the appropriateness of criteria for eligibility or exclusion."¹⁷⁷

In addition to the problems relating to discretion in the criminal justice system and deference in matters involving competing interests and resources, Albertyn and Goldblatt cite inconsistencies in South African Constitutional Court equality jurisprudence in general. These inconsistencies confirm that "while some of the Court's decisions have taken account of the context of women's lives and the multiple burdens that arise in South Africa's patriarchal society... gender equality is not always understood or applied adequately by all of the judges on the Court [and] gender issues seem to test many ideas around prejudice and stereotyping that seem less complex when seen through the prism of race."¹⁷⁸ In this regard, they confirm that "the Constitutional Court has repeatedly protected the rights of marginal groups... [but] notable exceptions...concerned claims on the ground of indirect gender discrimination [in the following cases, *Jordon & Others v S* 2002 (11) BCLR 1117 (CC) which concerned the discriminatory effects of the criminalization of prostitution on women prostitutes; *Harksen v Lane* NO 1997 (11) BCLR 1489 (CC) which concerned the rights of women who are married out of community of property when estates are sequestered; and *Volks v Robinson*

¹⁷⁶ Fredman (2005:165). Moreover Fredman confirms at 164 that "resource allocation requires a complex assessment of wide ranging and polycentric facts and necessitates the setting of priorities and the balancing of interests [and] judges, with their limited fact finding capacity and absence of democratic accountability, are arguably unsuited to decision making of this kind." This leaves Fredman to ponder at 164, "does this have the paradoxical effect that substantive equality although fashioned to be more far-reaching than formal equality, instead heralds a more deferent judicial stance?"

¹⁷⁷ Fredman (2005:164).

¹⁷⁸ Albertyn and Goldblatt (2012: 35-60 to 35-61).

NO 2005 (5) BCLR446 (CC) which concerned the rights of a unmarried women to claim maintenance from the estate of a deceased partner].”¹⁷⁹

In light of the above noted obstacles with applying the equality and anti-discrimination provisions of the Constitution this chapter suggests an alternative Constitutional analysis in relation to the Government’s obligations to ensure proper provision of compensation to victims of sexual violence via the Social Relief of Distress Grant and offender compensation via sentencing and forfeiture provisions. In this regard, taking into consideration that compensation can help victims escape abusive environments and thus ensure they are not subjected to secondary victimization, this chapter will review constitutional provisions relating to security of the person in section 12 of the Constitution and suggests that these provisions can be relied upon should equality arguments fail to resonate with judges and the criminal justice policy makers.

¹⁷⁹ Albertyn and Goldblatt (2012: 35-82).

2.1 The right to equality and non-discrimination

Subsection 9(1) of the Constitution confirms that every person ‘is equal before the law and has the right to equal protection and benefit of the law.’¹⁸⁰

Subsection 9(5) of the Constitution provides that direct or indirect discrimination by the state on the prohibited grounds listed in subsection 9(3), one of which is gender, is presumed to be unfair unless it is established that the discrimination is fair¹⁸¹. Finally section 9(2) requires the state to positively promote equality.

The above precepts are applicable to this thesis as the author is asserting that victims of sexual violence are being treated in a discriminatory manner, and in violation of section 9(1) of the Constitution, as their compensatory concerns are not being fully addressed by the criminal justice system role-players, on account of biases, while other classes of victims, namely commercial crime victims and violent crime victims in general, are provided with extensive prosecutorial and judicial assistance in relation to their quantifiable losses. Furthermore, when differentiations are made on account of biases they are necessarily irrational and arbitrary. Albertyn and Goldblatt confirm that “irrational or arbitrary classifications” by the state, on any basis, is “unconstitutional.”¹⁸²

Furthermore, this thesis asserts that discrimination occurs, in contravention of subsections 9(2), 9(3) and 9(5) of the Constitution, when the weaknesses of female complainant/witnesses in the criminal justice system, are irrationally exacerbated, when role-players do not change current practice, or when they fail to implement positive measures to assist female victims, on account of the biases they hold.

¹⁸⁰ Constitution, subsection 9(1).

¹⁸¹ Constitution, subsection 9(5).

¹⁸² Albertyn and Goldblatt (2012:35-15). They also note that the “weak rationality constraint on state action renders irrational or arbitrary classifications unconstitutional.”

Unfortunately, even though the right to equality is of utmost importance to vulnerable victims of sexual violence, difficulties do arise in applying these paramount Constitutional principles in sentencing and forfeiture proceedings as it is a well settled principle of law that judicial and prosecutorial discretion must be left intact in a constitutional democracy for the criminal justice system to function properly. In this regard, as noted by Terblanche, ‘the right of all people... to be equal before the law is beyond argument [as] our Constitutional Court has made this abundantly clear [but] so far, our courts have often resigned themselves to the view that the control of sentence discretion is simply too difficult, with the result that the inconsistencies have to be tolerated.’¹⁸³

With the above in mind, prosecutors and sentencing judges often improperly disregard victims’ compensation needs, in individual cases, by using their sentencing discretion and over emphasising other factors such as the specific characteristics of the offender and the nature of the crime. SS Terblanche notes that:

‘Sentences have to be expressed in terms of a fine or some amount, or of imprisonment or correctional supervision of so many months or years, or of another suitable currency. The violence used in a crime, or the amount of money embezzled, or the extent of the driver’s drunkenness simply does not convert into the currency of sentences. This conversion is achieved through the application of the sentence discretion.’¹⁸⁴

Furthermore, with regards to NPA public policy formation, in relation to compensation in sexual violence prosecutions in general, and in forfeiture proceedings, it is clear that the courts will allow government a great deal of discretion. Anashri Pillay confirms, in *Sexual Offences Commentary Act 32 of 2007*, that “public authorities are generally permitted to formulate and rely on policies, guidelines and directives provided they fall within the scope of the

¹⁸³ Terblanche (2007: 123).

¹⁸⁴ Terblanche (2007: 114).

powers granted to them by the statute and the policies or guidelines are consistent with the purpose of the statute.”¹⁸⁵

Again despite the difficulties of applying equality provisions for the benefit of complainants in sentencing proceedings, due to the deference provided to government, it is still clear that victims of sexual violence are being treated in a discriminatory manner and in violation of Constitutional equality provisions. This is so, as their compensatory concerns are not being fully addressed by the criminal justice system while other classes of victims, namely commercial crime victims, are provided with extensive prosecutorial and judicial assistance in relation to their quantifiable losses (as confirmed in subsection 7.1.1). This is clearly in contravention of section 9(1) of the Constitution. Also as confirmed in this thesis, sexual violence victims’ financial vulnerabilities (as identified in the survey in Chapter 8) are not addressed by way of compensatory provisions that are mandated in NPA policy directives, and case law precedents, thus furthering disadvantages and inequalities in contravention of subsections 9(2) and (3) of the Constitution.

With the above constitutional concerns in mind, as was previously done in *S v Z and 23 Similar Cases* 2004 (1) SACR 400 (E) it is suggested that structural interdicts should be canvassed, whereby a court can order “an organ of State to perform its constitutional obligations and report on its progress in doing so from time to time.”¹⁸⁶ In *S v Z* the court reviewed the adequacy of child offender facilities in South Africa and it is suggested that a structural interdict could also

¹⁸⁵ Pillay (2011: 26-7).

¹⁸⁶ Note *S v Z and 23 Similar Cases* 2004 (1) SACR 400 (E), at 417 C to G, it was confirmed that: ‘the positive obligations that the Constitution places on the State – to ‘protect, promote and fulfill’ fundamental rights – means that in proper cases, new approaches to remedies are called for... [and therefore] judicial innovation may be necessary to properly and effectively remedy constitutional infractions by fashioning new remedies... [and] one of the remedies that has been developed and utilized in countries that, like South Africa, are committed to the values of human dignity, equality and freedom, is the structural interdict, a remedy that orders an organ of State to perform its constitutional obligations and report on its progress in doing so from time to time.’

be used monitor the provision of state and offender compensation and ensure biases were are no longer preventing their use.

2.2 The prohibition of violence from either public or private sources

Sections 12(1)(c) and 28(1)(d) of the South African Constitution prescribe that “...everyone has the right to freedom and security of person, which includes the right... to be free from all forms of violence from either public or private sources,” and that ‘...every child has the right ... to be protected from maltreatment, neglect, abuse and degradation.’¹⁸⁷

Unfortunately the adherence to the above guidelines seems to be a distant reality in South Africa when one looks at the prevalence of sexual violence currently directed at women and children.¹⁸⁸ To be fair, South Africa is not alone in having unmet constitutional guarantees regarding gender and child abuse, as sexual violence is widespread in developed and developing countries, especially amongst women and children who are marginalized economically and socially.¹⁸⁹

In light of the widespread prevalence of sexual abuse it is difficult to pinpoint the specific course of action that is needed to diminish sexual violence within South Africa. This is especially so, when it is likely that sexual assaults will still occur in great numbers regardless of any future legal reform as evidenced by the relatively undiminished rates of sexual offences in developed countries with decades old progressive rape reforms laws and generous victim assistance programmes.¹⁹⁰ Regardless, in pursuit of these constitutional principles, the

¹⁸⁷ Constitution, subsections 12(1)(c) and 28(1)(d).

¹⁸⁸ See South African Police Service (2006:51) where the *Annual Report of the South African Police Service 2005/2006* confirms that between the 2001/2002 and the 2005/2006 fiscal years between 52 425 and 55 114 rapes were committed yearly. These amounts do not include unreported rapes.

¹⁸⁹ For example, research has shown that North American Aboriginal women and children encounter significantly higher levels of sexual violence when compared to other citizens. In this regard, a Canadian Ministry of Industry Report (2006: 6) entitled *Victimization and Offending in Canada's Territories 2004-2005* confirms that '[Aboriginal] residents of the territories [in the northernmost part of Canada] are three times more likely than provincial residents [in the rest of Canada] to experience violent victimizations such as sexual assault.'

¹⁹⁰ Du Mont (2003: 309) confirms that despite new Canadian laws restricting evidence on prior complaints and previous sexual history, harsher sentencing guidelines and the removal of the marital exemption, 'it [still] remains a matter of debate whether, and to what extent, the new approach has improved the situation for women.' This assertion is backed up (at 311) when the

South African government does have an obligation to use all available means to reduce sexual violence and in this regard the Constitutional Court and international human rights bodies provide directives on how this task should be accomplished. More specifically, in relation to this thesis, it has been suggested by international gender experts that compensation can assist victims of sexual violence by providing them with money to remove themselves from abusive environments and from repeat victimization (see below comments from the former United Nations Special Rapporteur on Violence against Women and the case law below).

The Constitutional Court in *S v Baloyi (2000) 2 SA 425 (CC)* confirmed the need for 'special law enforcement procedures' in a precedent setting case that involved familial violent crime. In this case, a respondent offender questioned the constitutionality of South Africa's predecessor domestic violence legislation, which resulted in a reverse onus upon a breach of an interdict. In confirming its position that a novel legislative framework was necessary to combat domestic violence, the court noted that 'ineffectiveness of the criminal justice system in addressing family violence'¹⁹¹ resulted in 'reluctance on the part of the victims to go through with criminal prosecutions.'¹⁹² Also the court noted the need for special law enforcement procedures as it encourages recourse to law for spouses who might otherwise suffer mutely because of unwillingness to invoke more drastic criminal proceedings.'¹⁹³

author cites the 'high rates of attrition that characterize sexual assault offences in Canada' and the 'handful of studies [that] have found that less than one-half of reported sexual assault cases are cleared by a charge.' Furthermore, Comack and Balfour (2004:17 to 18) confirm that the discrepancy in statute law and practice occurs for two reasons: first they assert that 'while [the Canadian] Parliament, in passing statute law, has endeavoured to be sensitive to the concerns raised by women's constituencies across the country, the courts have ostensibly been guided solely by the principles of fundamental justice [and the rights of the accused]' and second they assert that their interviews with justice role players confirms that 'in the interest of defending their clients, lawyers [in Canada] can strategically subvert and sabotage the intention of law reforms that they believe are politically motivated [by gender advocates as opposed to sound legal principles].'

¹⁹¹ *S v Baloyi (2000) 2 SA 425 (CC)* at 433B par 12.

¹⁹² *S v Baloyi (2000) 2 SA 425 (CC)* at 436A par 16.

¹⁹³ *S v Baloyi (2000) 2 SA 425 (CC)* at 437A par 18.

The Court went on to confirm an important legal precedent, when it pronounced that 'section 12(1) [of the Constitution] has to be understood as obliging the State *directly to protect* the right of everyone to be free from private or domestic violence [emphasis added].'¹⁹⁴ Furthermore the Court stated that 'provided it remains within constitutionally appropriate limits, the Legislature must enjoy a reasonable degree of latitude or margin of appreciation in choosing appropriate solutions to a grave social ill, particularly when the need for special law enforcement procedures has become manifest.'¹⁹⁵

This decision was subsequently re-affirmed by the Supreme Court of Appeal in *Van Eeden v Minister of Safety and Security* (2003) 1 SA 389 (SCA) wherein a delictual claim against the police was allowed to proceed despite future ramifications regarding government liability. In this matter the court found that the police were under a legal duty to take positive measures to prevent crime and failed to do so when a serial rapist escaped custody and sexual assaulted a woman. More specifically, the court affirmed the *Baloyi* judgment, when it concluded that 'section 12(1)(c) requires the State to protect individuals, both by refraining from such invasions itself and *by taking active steps to prevent violation* of the right [to be free from all forms of violence from either public or private sources] [emphasis added].'¹⁹⁶

Although the Constitutional Court and the Supreme Court of Appeal made it clear that the Government must take positive steps to reduce gender violence and child abuse they did not provide a detailed strategic plan on how this should be accomplished. Instead, as the *Baloyi* judgment directs, the executive and the legislature is mandated with this policy role, as judges do not have administrative experience and budgetary training to administer or implement crime prevention programmes. With this judicial deference in mind, international and domestic

¹⁹⁴ *S v Baloyi* (2000) 2 SA 425 (CC) at 432C par 11.

¹⁹⁵ *S v Baloyi* (2000) 2 SA 425 (CC) at 442D par 30.

¹⁹⁶ *Van Eeden v Minister of Safety and Security* (2003) 1 SA 389 (SCA) at 397F par 13.

human rights bodies that specialize in gender violence can be of great assistance to the executive and the legislature when it fulfills its positive duty to protect vulnerable women and children. For example, the office of the United Nations Special Rapporteur on Violence against Women has set out clear directives on the ways governments can assist with reducing gender violence. In this regard it has been confirmed that, if governments wish to substantially reduce gender violence they “should ensure that there are multiple, non-penal programmes such as ‘telephone hotlines, health care, counselling centres, legal assistance, shelters, restraining orders and financial aid to victims of violence.’”¹⁹⁷

With the above positive actions in mind, it is suggested that structural interdicts should be canvassed to monitor the provision of state and offender compensation, in addition to the provision of other programmes such as ‘telephone hotlines, health care, counselling centres, legal assistance, shelters [and] restraining orders.’”¹⁹⁸

¹⁹⁷ United Nations. Commission on Human Rights (2006: page11, paragraph 47).

¹⁹⁸ Ibid.

2.3 The Legislature's Margin of Appreciation when preventing violence

The Constitutional Court provided the government and legislature with a high degree of deference¹⁹⁹ or 'latitude' in the crime prevention sphere in *S v Baloyi* as this necessarily involves public policy considerations. The deference provided to government in the *Baloyi* case is sensible as the case upheld a legislative enactment with the laudable goal of preventing domestic violence and therefore the court rightly provided the government and the legislature with leeway to create new laws to assist in this important endeavor.²⁰⁰ Still, other judgments, involving the administration of the criminal justice system, have backed away from such a deferential stance, irrespective of the fact that policy considerations were being reviewed, such as the case of *S v Z and 23 Similar Cases* 2004 (1) SACR 400 (E) wherein little deference was afforded to government policy makers in a case involving the adequacy of child offender facilities in South Africa.²⁰¹

Richard Goldstone, former justice of the South African Constitutional Court, has confirmed the difficulties faced by the judiciary when they must determine the amount of deference they should afford government decision makers. He suggests that confusion occurs when courts unnecessarily focus on differences between positive state obligations and negative obligations rather than looking at

¹⁹⁹ The Court in *S v Baloyi* stated that 'provided it remains within constitutionally appropriate limits, the Legislature must enjoy a reasonable degree of latitude or margin of appreciation in choosing appropriate solutions to a grave social ill, particularly when the need for special law enforcement procedures has become manifest.' (*S v Baloyi* 2000 (2) SA 425 (CC) at 442D par 30).

Also note that deference is a legal term employed in judicial review or appellate litigation to gauge how much discretion the courts should provide the state decision maker. By way of background note Mullan (2006: 43) where is noted that the Canadian Supreme Court of Appeal has directed that lower courts must consider setting levels of deference, in judicial review proceedings 'whether the respondent was an adjudicative tribunal or a Minister of the Crown.'

²⁰⁰ It is also important to note that deference can also be provided to government in relation to policy formation in general, as opposed to legislative enactments. More specifically, Pillay (2011:26-7) confirms, in *Sexual Offences Commentary Act 32 of 2007*, that "public authorities are generally permitted to formulate and rely on policies, guidelines and directives provided they fall within the scope of the powers granted to them by the statute and the policies or guidelines are consistent with the purpose of the statute."

²⁰¹ Again note *S v Z and 23 Similar Cases* 2004 (1) SACR 400 (E), at 417 C to G.

the right in question. In this regard, he notes that the 'dichotomy between positive and negative rights breaks down at a fundamental level because many judicial decisions involve some determination of the allocation of public funds.'²⁰² Citing the example of prison conditions, he notes, 'such decisions may be based on the premise of protecting the negative rights of incarcerated individuals [to be free from inhuman conditions and torture], however, they also entail a positive obligation because they compel government action that is likely to cost hundreds of millions of dollars.'²⁰³

The author agrees with Goldstone's position and asserts that when a fundamental civil and political right is involved, such as the right to be free from violence, then the level of deference afforded to the government should be lower than when a socio-economic right is involved, as the Constitution requires²⁰⁴. Also, with reference to this thesis, it can be argued that the courts should provide the government with little deference when presented with litigation on the inadequate provision of compensation to victims of sexual violence irrespective of the nature of the obligation in question (be it negative or positive).²⁰⁵ More

²⁰² Goldstone (2006:4).

²⁰³ Ibid.

²⁰⁴ Govender (2006:102) notes that 'an infringement of fundamental rights [such as the right to be free from all forms of violence, maltreatment, neglect, abuse and degradation] is a serious matter in a constitutional democracy and warrants the state supplying a reasonable justification in support of its law or conduct [or inaction].' With this in mind, Govender notes that 'in deciding whether the explanation is constitutionally permissible the importance of the right... [is] of critical importance.' Also note that the Constitution provides that most socio-economic rights can be 'progressively realized' as opposed to civil and political rights which must be addressed forthwith.

²⁰⁵ Pitea elaborates on the difficult issue of deference in the gender violence sphere, when positive rights are at play, when she comments on the European Court of Human Rights' judgment in *M.C. v. Bulgaria* (2005) 40 E.H.R.R. 20. More specifically, in this case Bulgaria's criminal provisions requiring force or threat in cases of rape to secure a conviction, irrespective of consent, were deemed to be a violation of the State's positive obligations to enact laws for the effective investigation and punishment of rape. By not fulfilling their positive legislative obligations the State was deemed to be in violation of the Council of Europe's Convention for the Protection of Human Rights and Fundamental Freedoms (Convention Number 1950/53, entered into force on 3 Sept. 1953), namely Article 3 regarding the prohibition against 'inhuman or degrading treatment or punishment.'

Despite the encouraging outcome in this case, as the court recognized that the respondent State was in violation of its positive obligations under Article 3 of the Convention, it is suggested by Pitea, that the court in an *obiter dictum* incorrectly described the 'margin of appreciation' doctrine

specifically, the courts should provide little deference to government when responding to its positive obligations to provide compensation, as state and offender compensation, in combination with other interventions, can significantly assist a large number of women and children with money so they can leave abusive environments and thus escape re-victimization. Also the courts should provide little deference to government when responding to its negative obligations to stop state role-players from continuing with biased decision making practices, as this unnecessarily preempts compensatory reviews and compensation can assist sexual violence victims with money so they can leave abusive environments and thus escape re-victimization.

as they condoned judicial deference and state discretion when a fundamental civil right was involved. More specifically, the Court asserted, at page 487 paragraph 154, that 'in respect of the means to ensure adequate protection against rape, states undoubtedly enjoy a wide margin of appreciation.'

Pitea (2005: 459-461) questions the courts position when she states: 'tension arises in particular when the issue of positive obligations is involved. If the more 'liberal' understanding of the doctrine is followed, a margin of appreciation would always exist where positive action is required from states, irrespective of the right at stake. In contrast, the stricter approach would link the existence of a margin of appreciation to the content of the provision invoked, rather than to the nature (positive or negative) of the obligation allegedly violated. The judgment in *M.C. v. Bulgaria*, in line with some previous Court's decisions, seems to [wrongly] support the understanding that positive obligations always allow for a margin of appreciation ... [in this regard, this case is in] striking contrast with the current case law of the Court. It is difficult, in fact, to reconcile the views expressed by the Court in the present case with the absolute nature of the right enshrined in Article 3 and with the idea that its application leaves little room for the consideration of 'local requirements'

2.4 Conclusions

This chapter confirms that Constitutional rights in section 9 (dealing with equality and discrimination) and section 12 (dealing with the security of persons) of the bill of Rights are affronted when institutionally engrained biases curtail the use of important compensation processes for victims of sexual violence.

With regards to section 9 of the Constitution, it enjoins government to positively promote equality and eradicate discrimination and biases. Therefore government must assist with the pecuniary needs of sexual violence complainants/witnesses who require state and/or offender compensation to pay for security, medical and court related expenses, and not block their access on account of biases.

Furthermore, the government must ensure that sexual violence victims are afforded equal protection and benefit of the law as it is unfair that certain classes of victims are currently provided with prosecutorial and judicial assistance in relation to compensatory processes, while sexual violence victims are not (as confirmed in Part Five).

With regards to section 12 of the Constitution, this requires the government to address repeat victimization, by way of positive actions and “special processes”, when victims do not avail themselves to police and therefore unnecessarily remain in abusive environments. This thesis argues that compensation can assist victims of sexual violence by providing them with money to leave abusive environments. Furthermore, as noted by Michael Bishop and Stu Woolman, in *Constitutional Law in South Africa*, “the violence contemplated by 12(1)(c) [of the Constitution] ought not be narrowly construed (even where 12(2)’s right to psychological integrity may also be invoked).”²⁰⁶ With this approach in mind, they suggest that Constitutional rights regarding the security of person are offended when “women (or men) [are] trapped in abusive relationships” and when women “live with threats and acts of intimidation.”²⁰⁷

²⁰⁶ Bishop and Woolman (2012:40-49)

²⁰⁷ Ibid.

Finally this chapter suggests that there should be little deference provided to government, when presented with litigation focusing on security of persons as this necessarily involves serious civil/political rights, such as the right to be free from violence, maltreatment, neglect, abuse and degradation. With this in mind, this Chapter supports the argument, while referencing the right to be free from violence, that proper resources and policies must be put in place to ensure that state and offender compensation provisions are thoroughly utilized to assist sexual violence victims so they may leave abusive environments and escape repeat victimization.

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-PART THREE-

**INTERNATIONAL HUMAN RIGHTS
AND PRACTICES IN THE DEVELOPING
WORLD**

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-CHAPTER THREE -
INTERNATIONAL HUMAN RIGHTS

3 Introduction

This chapter will review the relevant international human rights instruments that encourage states to facilitate offender or state compensation to the following classes of victims: victims of violent crime (including victims of sexual crime); child victims of violent crime (including sexual crime); and female victims of gender based violence (including victims of sexual violence).

As noted in the methodology review, in subsection 1.4, normative law²⁰⁸, including international human rights precepts, are reviewed in this thesis for background purposes only as the thrust of this work focuses on the task of identifying and treating biases within the South African criminal justice system by deconstructing legal processes via new empirical research.

Also, numerous legal and policy imperatives are currently in place in South Africa, which confirm that victims of sexual violence should be provided with compensatory assistance/reviews in criminal proceedings (see Chapter Five for a review of the extensive laws and policies which implore prosecutors, state attorneys and judges to assist sexual violence victims with their compensatory concerns). Therefore, although it is important to ensure that laws and policies do not discriminate against women, and are thus consistent with international law as required by subsection 39(1)(b) of the Constitution²⁰⁹, it is equally important to tackle biases that subvert “good law” via structural initiatives. This approach is consistent with the comments of Anne McGillivray and Brenda Comaskey, who confirm that it can be argued that “[human] rights discourse, and the use of the

²⁰⁸ Albertyn (2005:220) where it is noted that “law has a practical and normative power (and) inter alia, this has been the power to include or exclude, to determine who has access to rights and resources and who falls within the boundaries of social and economic recognition/affirmation or beyond them in processes of exclusion, stigmatization and marginalization.”

²⁰⁹ Constitution, subsection 39(1)(b).

legal system to assert rights, bypass[es] the social restructuring necessary to improve the social and economic status of women.”²¹⁰ Furthermore they note that “gender neutral application of state and international law must yield to gender specific responses to the abuse of women... [as] the essence of discrimination is not the failure to criminalize intimate violence – most aspects of intimate violence are already crimes in most countries – but rather the failure to enforce laws equitably across gender lines.”²¹¹

Finally it is important to note that there is a lack of clarity on the obligations of states to compensate victims of sexual violence, and victims of violence in general, or to facilitate offender compensation thereto. More specifically, while some international gender experts assert that the provision of compensation to victims of sexual violence, by way of criminal law processes is an international customary right other commentators disagree.

More specifically, Von Bonde suggests that compensation to victims of crime, who are abused without the involvement of state negligence or participation, may not be obligatory under international law when he confirms that:

‘...whether international law places a legally binding obligation on states to institute a system of state compensation and to ensure the efficient functioning of restitution is open to discussion. However it clearly expects states to give serious attention to achieving these goals.’²¹²

In addition the South African Law Reform Commission (SALRC) confirms that “the South African State has, to date, not assumed a legal obligation to compensate, or contribute to the compensation of the victim.”²¹³

²¹⁰ McGillivray and Comaskey (2004:160). They also note, at160, that “discrimination by the justice system and male privileging and extreme individualism embedded in traditional rights thinking, suggest that rights discourse is inconsistent with women’s reality, defined as relational rather than individualist”

²¹¹ McGillivray and Comaskey (2004:153).

²¹² Von Bonde (2010: 209)

²¹³ SALRC (2004: 76, paragraph 4.77)

Conversely, the former United Nations Special Rapporteur on Violence against Women Yakin Erturk, in her report *Integration of the Human Rights of Women and the Gender Perspective: Violence against Women, The Due Diligence Standard as a Tool for the Elimination of Violence against Women*, suggests that 'there is a rule of customary law that obliges States to prevent and respond to acts of violence against women with due diligence' and one of many, due diligence responses that international customary law requires is for States "to take positive action to... compensate victims of violence."²¹⁴

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²¹⁴ UN Commission on Human Rights (2006:8, paragraph 29).

3.1 Compensation for all victims of violent crime

This subsection focuses on victims of violent crime in general without reference to children, or gender.

The *United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*²¹⁵ (hereinafter referred to as the *Declaration of Basic Principles*) was adopted by the United Nations General Assembly on 29 November 1985. In addition to being a formal signatory to the *Declaration of Basic Principles*, the South African government has referenced this instrument in two policy documents: the DOJCD's *Service Charter for Victims of Crime in South Africa*²¹⁶ as approved by the Cabinet in 2004; and, the Department of Social Development's *National Policy for Victim Empowerment*,²¹⁷ as approved by the Cabinet in 2009.

The Declaration of Basic Principles provides the following directives:

- Principle 8 – 'Offenders or third parties responsible for their behavior should, where appropriate, make fair restitution to victims, their families or dependents.'²¹⁸

²¹⁵ *The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* General Assembly Resolution 40/34 (29 November 1985).

²¹⁶ DOJCD (2004: 3 and 4), *Service Charter for Victims of Crime in South Africa* wherein the right to compensation is outlined in this non-binding administrative protocol.

²¹⁷ Department of Social Development (2009: 14 and 26), *National Policy for Victim Empowerment* wherein the following is noted: '[the National Victim Empowerment Management Forum will] develop programmes for the extension of victim-offender mediation, victim compensation and restitution, where possible' and 'compensation refers to a payment that makes up for a loss that has been suffered.'

²¹⁸ *The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* General Assembly Resolution 40/34 (29 November 1985), principle 8.

- Principle 12 – ‘When compensation is not fully available from the offender or other sources, States should endeavor to provide financial compensation to:

(a) Victims who have sustained significant bodily injury or impairment of physical or mental health as a result of serious crimes;

(b) The family, in particular dependents of persons who have died or become physically or mentally incapacitated as a result of such victimization.’²¹⁹

With regards to Principle 8 and offender based compensation, the *Guide for Policy Makers on the Implementation of the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*²²⁰ enumerates a list of procedures and techniques that can assist with offender restitution and/or compensation, many of which are provided for in South African criminal procedure legislation and common law. These include: considering payment as a mitigating factor in sentencing; suspending a sentence on condition of payment; and, using assets seized or forfeited to the state for victim compensation.²²¹

²¹⁹ *The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* General Assembly Resolution 40/34 (29 November 1985), principle 12.

²²⁰ United Nations Office for Drug Control and Crime Prevention: Centre for International Crime Prevention, *Guide for Policy Makers on the Implementation of the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (1999).

²²¹ *Ibid.*

With regards to Principle 12 and state compensation, this directive is premised on both utilitarian societal concerns (which stress connections between the provision of compensation and the reporting of crime which thus ensures public safety) and a victim-centered foundation (which stress the importance of victim needs).²²²

²²² Existing compensation schemes in Europe and North America, like the Indian models discussed in subsection 4.2, are premised to a large degree on a societal utilitarian theory, as compensation can be used as an inducement to victims to cooperate with the criminal justice system irrespective of any benefits that may befit victims. Governments often conceal this utilitarian influence for political purposes as they prefer to be seen as generous social welfare benefactors to vulnerable victims. Buck (2005: 176) notes, when examining European government compensation schemes for victims of violent crime, that:

Compensation schemes do not officially connect themselves more closely to criminal law and criminal justice. Nevertheless, the link to criminal law and criminal justice reasoning should not be neglected. For instance, both the British and the German schemes require the victim to report the incident and to co-operate with the judicial authorities. In giving crime victims the prospect that the state will compensate them, they are 'motivated' to play their role as witness and source of information in accordance with the needs of the criminal justice system. These last observations indicate that criminal justice reasoning influences state compensation provisions much more than generally admitted.

Julie Goldscheid (2004: 216-17), echoes Buck's analysis, from an American perspective, when she confirms that:

The [United States] congressional findings accompanying the final version of VOCA [Victims of Crime Act of 1984] reflect[ed] Congress's concern that public respect for the law would be diminished if steps were not taken to help victims. The findings also highlighted Congress's hope that the compensation program would advance the criminal justice system's need for victim cooperation. VOCA's requirement that compensation recipients must report the crime to the police and cooperate in the prosecution concretizes this theory in a very practical way.

3.2 Compensation for child victims of violent crime

The United Nations' Economic and Social Council adopted the United Nations' Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime²²³ in July 2005 (hereinafter referred to as the Guidelines). With regards to compensation, Part 8 of the Guidelines, entitled 'The Right to Reparation' is of significance. The relevant sections in this regard are as follows:

- Article 35 – 'Child victims should, wherever possible, receive reparation in order to achieve full redress, reintegration and recovery. Procedures for obtaining and enforcing reparation should be readily accessible and child-sensitive.'²²⁴
- Article 36 – 'Provided the proceedings are child-sensitive and respect these Guidelines, combined criminal and reparations proceedings should be encouraged, together with informal and community justice procedures such as restorative justice.'²²⁵
- Article 37 - 'Reparation may include restitution from the offender ordered in the criminal court, aid from victim compensation programmes administered by the State and damages ordered to be paid in civil proceedings. Where possible, costs of social and educational reintegration, medical treatment, mental health care and legal services should be addressed. Procedures should be instituted to ensure enforcement of reparation orders and payment of reparation before fines.'²²⁶

²²³ Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime, Annexed to Resolution 2005/20, Economic and Social Council, E/2005/INF/2/Add.1 (29 June to 27 July 2005) forthcoming in the *Official Records of the Economic and Social Council* (2005) Supplement No.1 (E/2005/99).

²²⁴ Ibid, Section 35.

²²⁵ Ibid, Section 36.

²²⁶ Ibid, Section 37.

3.3 Compensation for gender based crime

The United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Beijing Declaration and Platform for Action (the Platform), as well as the Declaration on the Elimination of Violence against Women (the DEVAW) all address the rights of women and girls to be free from gender violence .²²⁷

These international instruments, directly and indirectly, help to address gender violence by refuting the 'public private distinction' in human rights law; by requiring the 'mainstreaming' of gender concerns into governmental programming; by placing a 'due diligence' standard in relation to the implementation of international gender agreements; and, by enumerating specific preventative and rehabilitative goals for State Parties with regards to violence against women.²²⁸ Furthermore, as noted by Anne McGillivray and Brenda Comaskey, "DEVAW encompasses private intimate acts of violence, violence within the community, and tradition practices harmful to women and girls... [and] on 20 December 1993, the UN General Assembly adopted DEVAW in the recognition that gender-based violence manifests unequal power relations and is the ultimate social mechanism for maintaining women's subordination to me."²²⁹

In South Africa, government has specifically recognized the importance of compensation to assist with gender based violence in accordance with the Beijing Declaration and Platform. In this regard, the former Office of the Status of Women, which was previously located in the Presidency's Office, in their second

²²⁷ Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res.34/180, 34 U.N. GAOR, Supp. No 46, U.N. Doc.A/34/46 (1980) reprinted in 1249 *UNTS* 13 and 19 *I.L.M.* 33 (1980).

Beijing Declaration and Platform for Action: Fourth World Conference on Women, Beijing, China, 4-15 September 1995, U.N. Doc.DPI/1766/Wom (1995) reprinted in 35 *ILM* 404 (1996).

Declaration on the Elimination of Violence against Women, 48 *UN GAOR*, U.N.Doc.A/Res/48/104 (1994).

²²⁸ *Ibid.*

²²⁹ McGillivray and Comaskey (2004:150-151).

progress report on the implementation of the Beijing Platform for Action, confirmed the importance of law reform initiatives to address 'limitations to victim compensation.'²³⁰ This commitment was provided to comply with 'Strategic Objective D1' of the Beijing Platform, which enjoins states to 'adopt and/or implement and periodically review and analyze legislation to ensure its effectiveness in...[providing] access to just and effective remedies, including compensation and indemnification and healing of victims.'²³¹

It is also important to note the work of two United Nations' bodies who engage with these important gendered Conventions, namely: the Committee on the Elimination of Discrimination against Women (which currently monitors CEDAW and who previously drafted DEVAW); and the Commission on Human Rights, which has a Special Rapporteur on violence against women. The Committee on the Elimination of Discrimination against Women has confirmed that pursuant to 'general international law and specific human rights covenants [like CEDAW], States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation.'²³² In addition, the Committee has requested states, pursuant to CEDAW 'to take all measures necessary to prevent gender-based violence.... [including] not only legal sanctions, civil remedies and avenues for compensation, but also preventive measures such as public information and education programmes, as well as protective measures, including support services for victims of violence.'²³³ Furthermore, the Committee has concluded that the above obligations can be read into the CEDAW commitments, even though the issue of gender based violence is not

²³⁰ Office of the Presidency (2005: 69, section 2.4.2.9 (d)), *Celebrating 10 Years of Freedom: Women Building a Better South Africa and a Better World*.

²³¹ The Beijing Declaration and Platform for Action, section 124(d).

²³² General Recommendation 19 Para 9 'Violence against women' U.N. Doc.A/47/8 (1992) at 248. This Recommendation reiterates the international law as first espoused by *Velasquez v Honduras* 28 *ILM* 291 (1989) (Inter-American Court of Human Rights).

²³³ General Recommendation 19, Paragraph 24(t) 'Violence against women' U.N. Doc.A/47/8 (1992) at 248.

specifically canvassed in the Convention, as gender based violence constitutes a form of gender discrimination.

Turning to the former Special Rapporteur, this office has previously confirmed that pursuant to the instruments referred to above, 'states have a duty to take positive action to prevent and protect women from violence, punish perpetrators of violent acts and compensate victims of violence.'²³⁴ In addition, the former Special Rapporteur, Yakin Erturk, has noted that 'the obligation to provide adequate reparations involves ensuring the rights of women to access both criminal and civil remedies' and that 'compensation for acts of violence against women may involve the award of financial damages for any physical and psychological injuries suffered, for loss of employment and educational opportunities, for loss of social benefits, for harm to reputation and dignity as well as any legal, medical or social costs incurred as a consequence of the violence.'

²³⁵

²³⁴ United Nations. Commission on Human Rights (2006: 2).

²³⁵ United Nations. Commission on Human Rights (2006: 19, para 84).

3.4 Conclusions

As noted in this Chapter, numerous international human rights instruments have endorsed the need for governments to ensure the proper provision of compensation to victims of sexual violence. Furthermore, international oversight bodies, which focus on the rights of women, confirm that state and offender compensatory processes can assist sexual violence victims with the unique financial barriers they must face when they engage with the criminal justice system and/or attend to their post-assault recoveries.

This Chapter also questions the value of the international human rights paradigm when trying to dislodge institutionalized biases within state institutions. It can be argued that “[human] rights discourse, and the use of the legal system to assert rights, bypass[es] the social restructuring necessary to improve the social and economic status of women.”²³⁶ With this in mind, as noted earlier by Anne McGillivray and Brenda Comaskey, “gender neutral application of state and international law must [therefore] yield to gender specific responses to the abuse of women.”²³⁷

²³⁶ McGillivray and Comaskey (2004:160). They also note (2004:160) “discrimination by the justice system and male privileging and extreme individualism embedded in traditional rights thinking, suggest that rights discourse is inconsistent with women’s reality, defined as relational rather than individualist”

²³⁷ McGillivray and Comaskey (2004:153).

-CHAPTER FOUR-

PRACTICE IN THE DEVELOPING WORLD

4. Introduction

This Chapter reviews practices and laws from India and Africa that assist with the provision of compensation to victims of sexual violence (and victims of violence in general) by way of state and offender sources. These jurisdictions are reviewed as the author wishes to rebut the widely held presumption that governments in the developing world cannot provide and facilitate state and offender compensation on account of budgetary concerns and state and offender impoverishment levels. These incorrect presumptions are held by many government and oversight bodies in South Africa.²³⁸

²³⁸ Many government departments and human rights bodies in South Africa have indicated that a dedicated state compensation fund for victims of violent crime is not affordable in the developing world and in South Africa particularly, as noted below:

(i) With regards to the position of the South African Government, in reply to a private members Bill from the Democratic Alliance, presented to the Committee on Private Members' Legislative Proposals and Special Petitions, in relation to the creation of a proposed victim compensation scheme, the following was noted by National Treasury on 24 August 2007:

- A dedicated government compensation fund for victims of violent crime in RSA would amount to a " 1st world country response to the challenges of a developing state " ;
- " Countries that have introduced [a] compensation fund could afford [it]."

(Parliament of the Republic of South Africa *Announcements, Tabling and Committee Reports*, 31 January 2008, [No 7 – 2008] Fifth Session, Third Parliament, Paragraph 4, at 98; Report of the Committee on Private Members' Legislative Proposals and Special Petitions on the legislative proposal on Fund for victims of violent crime, dated 31 August 2007).

(ii) With regards to the South African Law Reform Commission (SALRC), their *Newsletter of the South African Law Reform Commission* Volume 9, Number 1 (June 2004), at 6, provides a brief summary of their *Report on A Compensation Fund for Victims of Crime* where it is concluded that " the establishment of a compensation fund [for victims of violent crime including sexual offences] is, at this stage, not a viable option [due to] the affordability of the fund in the current financial climate."

(iii) With regards to the South African Human Rights Commission's position note SABC 3 television's broadcast of *Interface* (July 31, 2005) wherein the former Chairperson, Jody Kollapen stated the following: " when I served on the Law Commission Sentencing Committee we undertook an intensive study into the issue of victim compensation...We

This chapter suggests that the South African government must re-assess its current practices, as victims of sexual violence are not provided with meaningful access to state and offender compensation in comparison to the Indian and Tanzanian models. This is especially so in light of the governments' constitutional duty to promote substantive equality²³⁹ and the international law instruments reviewed Chapter Three which require the provision of state and offender compensation to victims of violent crime.

found that under the [present] circumstances South Africa cannot afford a victim compensation scheme.”

With regards to offender compensation it is often assumed sexual violence offenders are unemployed and without means in the developing world and in South Africa. More specifically, the SALRC (2004: page 63, paragraph 4.45) has suggested that “many [offenders] lack the means or will to compensate their victims.” Also the SALRC suggests (2004: page 126, paragraph 5.80) that “the bulk of offenders are probably poor.”

The below research rebuts the above assumption as many sexual violence offenders are not impoverished in South African and this is likely the case in the developing world as well:

(i) Rasool et al (2002: 56) cite the following statistics, gathered for their comprehensive nation-wide South African survey, as it relates to sexual violence against women 18 years of age and over: 60% of the sexual abusers studied were working while 8% were working most of the time; 66% had monthly earned incomes of 1000 Rand or more; 30% had monthly income of 4000 Rand or more; and only 14% had no monthly income.

(ii) Andersson et al (2000: 20) note in their survey of 2059 men aged between 13 and 83 years, that 'there was no significant difference in the responses between employed and unemployed men as to whether they had sex with a woman without her consent.'

(iii) Kistner et al (2004: 21) note the prevalence of perpetrators that are employed teachers. The authors state that 'a study conducted by the South African Medical Research Council in 2002 found that...in most of the cases [of child rape], the offenders were found to be teachers (about 33%)', and at 22-23 it is noted that, educators have 'comparatively high incomes.'

(iv) Townsend and Dawes (2004: 69) reveal that 'child abusers come from a variety of backgrounds. This is true for South Africa as well as elsewhere... [researchers have noted] that their experience at Resources Aimed at the Prevention of Child Abuse and Neglect (RAPCAN) proves that rape and child sexual abuse happen amongst all class groups, all racial categories, regardless of affluence, religion, poverty or any other broad societal category.'

²³⁹ Note the discussions on substantive equality in subsection 1.2 of this thesis. Also Mosenke J, in *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC), 2004 (11) BCLR 1125 (CC) at paragraph 27, confirms that “the substantive notion of equality recognizes that besides uneven race, class and gender attributes of our society, there are other levels and forms of differentiation and systematic under-privilege, which still persists [and] the Constitution enjoins us to dismantle them and to prevent the creation of new patterns of disadvantage.”

Furthermore, it is important to note that state compensation is currently available for victims of violent crime in South Africa, namely the state sponsored SRDG and CWS benefits (as outlined in subsection 5.3). Unfortunately these grants/stipends are not fully streamlined into court processes and NPA directives do not require prosecutors to inform victims of sexual violence about these government benefits and assist them with referrals and supporting letters (as outlined in subsection 5.3 and Chapter 9). With this in mind, perhaps a dedicated victim compensation fund in South Africa, like the one that exists in the Indian province of Tamil Nadu for example, could better serve victims of violent crime (including sexual violence victims). Currently there is confusion as to the role SRDG and CWS benefits plays in the criminal justice system in relation to the provision of financial assistance to witnesses and complainants, a dedicated victim fund could clarify the role that state compensation can play within the criminal justice system.²⁴⁰

²⁴⁰ The most comprehensive South African report to date on victim compensation can be said to be the SALRC's Final Report, "*A compensation Fund for Victims of Crime*" (2004) (hereinafter referred to as the 'Final Report'). This report includes in depth comments from the leading criminal justice experts in South Africa and is therefore considered authoritative.

Unfortunately, this Final Report neglects to mention the SRDG despite the fact that this grant can assist victims of violent crime with their emergency post-assault expenses (as outlined in 5.3 of this thesis). In this regard the Final Report explains at great length how indigent victims are greatly disadvantaged on account of unexpected financial difficulties that arise after their victimization yet no mention of the SRDG is made. The fact that the report does not mention this important source of emergency government assistance clearly shows that the applicability of the SRDG grant is not fully understood by criminal justice experts.

Also note SALRC (2011:1) and the media statement that was issued when the Final Report was released to the public seven years after completion. In this regard, the Chairperson of the SALRC, Mokgoro J, incorrectly omitted the SRDG and WCS when she noted that "currently no compensation exists for victims of crime in South Africa outside the courts' prerogative to enforce a restitution order in respect of the offender if convicted [and] victims have to enforce their right to compensation by instituting civil actions against the perpetrators."

Also Mokgoro J did not refer to the SRDG when she noted, in page 2 of the media statement, that "the Commission proposed [in the Report that] a victim empowerment programme [be set up]...which includes limited financial support for victims of crime in certain exceptional and limited circumstances." This statement is misleading as the SALRC is proposing the creation of a new emergency source of state funds, for victims of violent crime, without mentioning that one already exists – namely the SRDG.

4.1 Compensation models in Anglophone Sub-Saharan Africa

Most Sub-Saharan African countries have compensation provisions in their criminal sentencing legislation, which can be employed in sexual offences prosecutions. However, the implementation of these provisions is often hampered when offenders are indigent and if prosecutors and the judiciary are not sensitized to the material needs of complainants, post assault.²⁴¹

One of the most promising law reform initiatives took place in Tanzania in 1998 when its government introduced mandatory compensation provisions within sentencing proceedings for sexual violence matters. The Chair of the Law Reform Commission of Tanzania, RJA Mwaikasu, first canvassed this bold law reform initiative in 1995 when he suggested that:

‘...in most cases, courts in this country have overlooked the need to apply the law to have victims of sexual assaults awarded compensation against their assailants. This may be due to want of appreciation that by hind of such crimes the victims have been subjected to serious mental and emotional suffering, though they are often found to have not sustained serious physical injuries....It is submitted that to similarly demonstrate the serious concern over sexual assault on women, our government and Parliament could as well make and order of compensation in all sexual offences, mandatory, and not left to the discretion of courts.’²⁴²

Following the above observations of RJA Mwaikasu the new *Sexual Offences (Special Provision) Act*²⁴³ came into force on 1 July 1998 with provisions that provided for mandatory compensation when an offender is convicted for certain

²⁴¹ The United Nations African Institute for the Prevention of Crime and the Treatment of Offenders (UNAFRI) *Report on the Training Seminar on Victims of Crime and the Prevention of Victimization in Africa* Publication No.6 (1992) at 4 to 5 notes that ‘in principle, in most jurisdictions in post-colonial Africa, there is nothing which prevents a judge or magistrate from awarding compensation to a victim of crime on top of any punishment... [but] payment depends entirely on the ability of the offender to pay.’

²⁴² Mwaikasu (1995: 269 – 270).

²⁴³ Act No.4 of 1998.

sexual offences matters.²⁴⁴ The Tanzanian provision clearly demonstrates that the linking of compensation to sexual offences sentencing is possible.

Beyond offender based compensation provisions in sentencing proceedings, it is also important to note that a growing number of Sub-Saharan African governmental Law Commissions and legal academics have acknowledged the need for state compensation schemes that are independent of criminal prosecutions/convictions and sentencing regimes.²⁴⁵ With this in mind State

²⁴⁴ The Tanzanian Penal Code, Chapter 15, Offences against Morality was amended by the Sexual Offences (Special Provisions) Act No.4 of 1998. Concerning rape, section 131 of the Penal Code formerly prescribed that: 'any person who commits the offence of rape is liable to be punished with imprisonment for life with or without corporal punishment.'

By way of the new Sexual Offences (Special Provisions) Act, Section 131 has now been replaced with the following prescription:

131-(1) Any person who commits rape is.... liable to be punished with imprisonment of not less than thirty years with corporal punishment, and with fine, and shall in addition be ordered to pay compensation of amount determined by the court, to the person in respect of whom the offence was committed for the injuries caused to such person.'

Furthermore, Section 3 prescribes that:

'injury': means an actual harm caused to a person and includes physical, mental and psychological suffering.'

Finally note that the ambit of the above sections was confirmed by the Court of Appeal of Tanzania, the highest appellant court, in *Criminal Case No.39 of 2005 (22 June 2007)*, on file with the author, whereby the previous High Court sentence was upheld, namely '30 years imprisonment and 4 strokes of the cane... [and] shs 50, 000 as compensation for the injuries she suffered though the rape.'

²⁴⁵ Examples include:

The United Nations African Institute for the Prevention of Crime and the Treatment of Offenders (1992:4 to 5), confirms that 'African governments should establish statutory systems for compensation of victim of crime which are easily accessible, particularly victims of indecent and violent crimes' and these schemes should be 'administered outside the normal court system,' be available even if the offender is not 'arrested, prosecuted or convicted' and be resourced by way of the 'State,' 'Fines,' or 'Prisoner Earning Schemes or Insurance Schemes.'

Associate Professor of Law and Deputy Vice Chancellor at Makerere University, Lillian Tibatemwa-Ekirikubinza, comments in furtherance of the Uganda Law Reform Commission's Report on the Sexual Offences Bill, confirms that 'in addition to any penalty given to the offender, victims of rape should be entitled to compensation from the offender...[and] where the offender is incapable of paying compensating, the victim should have access to a Victim's Compensation Fund to be set up by the State.' (2006:106).

Feltoe of the Zimbabwean Legal Resources Foundation comments, in *A Guide to the Zimbabwean Law of Delict* (2006:123) that criminal compensation procedure legislation can 'only result in actual compensation if the criminal wrongdoer has some money or property that can be used in order to compensate the victim' and that 'we presently have no State scheme where

compensation has been recommended as a remedy when offenders are not found, not convicted, or not in a financial position to provide compensation to complainants. Unfortunately, despite suggestions that state compensation schemes should be implemented, no African country has instituted a dedicated fund to assist victims of violent crime.

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under the State will pay compensation out of a central fund to crime victims if the wrongdoer has no means that can be used for compensation purposes.' (2006: 123).

4.2 The Indian compensation model

In addition to compensation processes within sentencing proceedings, which convicted offenders may be subject to, India also has numerous provincial compensation programmes in operation which provide valuable assistance to victims of sexual violence without a state nexus required (so that victims involved in sexual violence that is not precipitated by state officials or by state negligence can obtain state compensation).²⁴⁶ As an aside, this situation is similar to the Canadian experience, as compensation can be ordered in sentencing proceedings, and many jurisdictions in Canada have dedicated victim compensation programmes (although it must be mentioned, like India a few jurisdictions in Canada do not have dedicated funds and therefore state compensation is not available should a crime occur in those specific regions).²⁴⁷

²⁴⁶ Examples of state/provincial compensation programmes include the foregoing:

(i) The State of Tamil Nadu's Victim Assistance Fund as referenced by K Chockalingam in 'Evaluation of the Implementation of Victim Assistance fund in Tamilnadu' (2008) in the *Indian Journal of Criminology and Criminalistics* where at 17 to 18 he notes that 'the creation of a victims assistance fund in the state of Tamil Nadu for victims of murder, rape and grievous injury, due to the efforts of the Indian Society of Victimology, is a boon for victims [and] five years after the fund's creation, this evaluation study brings to light the actual implementation of the fund and its effectiveness.'

(ii) The National Ministry of Social Justice and Empowerment's Programme under the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 and its Rules, 1995. As noted in the Ministries 19th Programme Report (tabled in Parliament in 2004) the national government provides financial assistance to State Governments for the 'relief and rehabilitation of affected persons'. Affected persons include caste and tribe women who have been subjected to atrocities mentioned in paragraph 1.3(xi) and (xii); namely crimes where an offender 'assaults or uses force to any women... with intent to dishonor or outrage her modesty' and 'being in a position to dominate the will of a women... uses that position to exploit her sexually to which she would not have otherwise agreed.' Paragraph 3.3(viii) goes on to state 'economic measures include monetary relief to atrocity victims, in which is in between Rs.20,000/- to Rs.2, 00, 000/- depending upon the gravity of the incidence of atrocity.' The report notes that in some provinces pension boards and social services/welfare departments are co-opted to assist with the distribution of compensation.

(iii) Provincial Criminal Procedure Legislation in the provinces of Bihar, Madhya Pradesh, West Bengal and Karnataka that makes it 'obligatory for the courts to award compensation [from public funds] in all cases of crime against the members of scheduled castes and scheduled tribes'. (Ramanathan 2001: 221).

²⁴⁷ Chief Justice of Ontario, R Roy McMurtry *Report on Financial Assistance for Victims of Violent Crime in Ontario* (May 2008) (released by the Ontario Provincial Government on August 21, 2008) at 22 confirms that 'all provinces except Newfoundland provide violent crime victims with some form of financial assistance [while] the [3] territorial governments do not provide criminal compensation programs.' Also note Andre Marin Ontario Ombudsman *Report Investigation into the Treatment of Victims by the Criminal Injuries Compensation Board* (February 2007) at 24

In addition to the current ongoing state compensation funds in India, as noted by the Press Information Bureau, of the Government of India:

“In 2009, Section 357A was added to the Criminal Procedure Act under which each State Government in coordination with the Central Government is required to formulate a scheme for compensating victims of crime or their dependents. Under this, a victim can get compensation for rehabilitation in cases in which the court finds it necessary. The compensation can be recommended even in cases where the trial ends in acquittal or discharge, provided there is a need for rehabilitation of victims. Compensation can also be granted where no trial takes place because the offender cannot be identified or traced but the victim requires rehabilitation. Thus while under Section 357 a victim is entitled to compensation only on conviction, compensation under section 357A is not necessarily linked to conviction. From the information available, States are in the process of preparing such a scheme.”²⁴⁸

Finally, the government of India also has formulated plans for a national compensation programme solely dedicated to victims of sexual violence.²⁴⁹ The proposal is still presently under consideration by the government and the impetus for this innovative scheme was judicial activism. In this regard, the Supreme Court of India decreed in *Delhi Domestic Working Women's Forum v Union of India and Others* 1 SCC (1995) that the government must ‘set up a Criminal Injuries Compensation Board’ as ‘rape victims frequently incur substantial financial loss’ relating to the disruption of employment, pregnancy and childbirth.²⁵⁰ In addition, the Court directed that compensation should not be dependent on a conviction and that pain and suffering compensation should be reviewed.

‘Ontario also fares well among Canadian programs... it is one of six provinces providing for lost earnings, one of eight that will cover funeral expenses, one of seven that will contribute medical expense or that will fund counseling... and one of only three that provide compensation for pain and suffering.’

²⁴⁸ Press Information Bureau/Government of India (2011).

²⁴⁹ Ibid. The Press Information Bureau (2011) also notes that this new fund for sexual violence victims “envisages setting up of Criminal Injuries Relief and Rehabilitation Boards at the Central, State and district levels for providing assistance of Rs. 1.5 lakhs as well as support services such as shelter, counseling, medical aid, legal assistance and vocational training [and] while compensation under section 357A is general in nature and covers all crimes, this Scheme is meant specifically for rape victims.”

²⁵⁰ *Delhi Domestic Working Women's Forum v Union of India and Others* 1 SCC (1995), at paragraphs 15(7) and (8).

In response to this Supreme Court directive, the Indian Department of Women and Child Development submitted a proposal for a national 'Relief and Rehabilitation of Victims of Rape Scheme'²⁵¹ (hereinafter referred to as the Scheme) to the Planning Commission of India.²⁵² The Scheme is structured so as to provide immediate relief to victims after they provide a police statement and a medical report, with the outstanding allotments provided after a formal administrative review.

The Indian 'Relief and Rehabilitation of Victims of Rape Scheme' is an excellent example of a mixed approach whereby utilitarian societal concerns (which stress the reporting of crime to ensure public safety) are combined with a solid victim-centered foundation (which stress the importance of victim services and assistance). In this regard, the proposed Indian compensation scheme for victims of sexual violence requires victim cooperation with the police and/or prosecution authorities as a prerequisite for eligibility²⁵³ while the Supreme Court in *Delhi Domestic Working Women's Forum v Union of India and Others*²⁵⁴ has confirmed that the underlying rationale for the scheme is to compensate women and children for the secondary victimization they will likely encounter in the criminal justice system. In this regard, the Indian Supreme Court asserted that 'rape does indeed pose a series of problems for the criminal justice system'²⁵⁵ and "in addition to the trauma of the rape itself, victims have had to suffer further agony during legal proceedings...[as] the court proceedings added to and

²⁵¹ The 'Draft Relief and Rehabilitation of Victims of Rape Scheme '(2005) prepared by the National Commission for Women, accessed at <http://www.mumbaipolice.org/archives02.htm> on 1 Nov. 2006.

²⁵² 'Rape victims in India to get Rs 2 lakh compensation' *Hindustan Times* (11 May 2006) and 'NCW moots new law for rape victims' relief' *Deccan Herald* (18 Sept. 2005).

²⁵³ The 'Draft Relief and Rehabilitation of Victims of Rape Scheme' suggests the following eligibility criteria and procedures: Section 11(c) - submission of medical certificate and police complaint form when apply for compensation; Section 11(d) - after the application is received and a prima facie case of rape is confirmed interim relief shall be ordered; Section 11(j) - compensation guided by the 'stand of the applicant at the trial'; and Section 11(q) - the Board shall reject a claim for compensation where the applicant failed to immediately inform the police and/or failed to co-operate with police or justice officials.

²⁵⁴ 1 SCC (1995).

²⁵⁵ Ibid at 18 par 13.

prolonged the psychological stress they had to suffer as a result of the rape itself.²⁵⁶

With the foregoing in mind, U Ramanathan, an expert on Indian social welfare programmes, concurs that creating a government compensation fund to encourage women to report rape 'does not seem to be premised on an irrational basis.'²⁵⁷ In addition, the Indian press has lauded the goal of the scheme, namely to 'encourage the reporting of such crimes and improve rape conviction rates in the country [as] only a miniscule percentage of women and children who are raped ever report the incident to the police.'²⁵⁸

To conclude this review, the State of Tamil Nadu's broad Victim Assistance Fund, and the other provincial compensation initiatives, as mentioned earlier set an important precedent as these remedial provincial initiatives provide government compensation to individual women who are sexually abused in private (as well as public spaces) irrespective of a state nexus. Furthermore, with regards to public policy approaches and fiscal budgetary priorities the State Government of Tamil Nadu has confirmed that impoverished jurisdictions can prioritize state compensation for victims of sexual violence along with other expenditures by way of balanced and priority budgeting.

²⁵⁶ Ibid at 18 to 19 par 13 to 14.

²⁵⁷ Ramanathan (2001: 220). Elsewhere, Ramanathan comments that 'the emergence of victimology in the domain of criminal law, which has been spurred on by the crisis in performance of the criminal justice system, and where the victim has over time become a bearer of loss without remedy, has given [state] compensation an added dimension.' (2005: 161).

²⁵⁸ 'Rape victims in India to get Rs 2 lakh compensation' *Hindustan Times* (11 May 2006) accessed at http://www.infochangeindia.org/Womenlh.jsp?section_id=1&detailurl=Women on 1 Nov. 2006. Also note 'NCW moots new law for rape victims' relief' *Deccan Herald* (18 Sept. 2005) accessed <http://www.deccanherald.com/deccanherald/Sep182005/national1625162005917.asp> on 1 Nov. 2006.

4.3 Conclusions

The international compensatory practices and models reviewed in this Chapter have one commonality – they are gender sensitive and they acknowledge the unique financial losses sexual violence victims incur. With this in mind, they address discriminatory patterns in criminal justice systems and the biases of state role-players. For example, the Tanzanian model ensures compensation reviews in every sexual violence case irrespective of the biases held by individual judges. Furthermore, the Tamil Nadu compensation scheme in India ensures that the gendered losses of women are addressed by the State itself and that sexual violence victims who are abused in public or private settings have meaningful access to the criminal justice system and to post-assault care services.

The existence of these international offender and state compensatory processes in these impoverished jurisdictions rebut widespread presumptions that state and offender compensation is not possible, nor advisable, in the developing world on account of state and offender resources. Further, these examples demonstrate how the international human rights instruments referred to in Chapter Three, which require states to ensure offender and state compensation, can be put into practice in the developing world despite financial constraints and concerns with offenders' ability to pay.

In conclusion, with regards to South Africa, it is suggested that these international precedents should cause some reflection on the part of the South African government in light of its constitutional duty to “promote” equality.

-PART FOUR-

**COMPENSATION PROCESSES
IN SOUTH AFRICAN CRIMINAL
PROCEEDINGS**

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-CHAPTER FIVE –

COMPENSATION PROVISIONS AND PROCESSES IN CRIMINAL PROCEEDINGS

5 Introduction

This chapter reviews the laws and processes that facilitate compensation to victims of sexual violence from offenders, alleged offenders and the state. Four (4) main compensatory processes are reviewed; firstly, offender compensation via CPA sentencing orders; secondly, alleged offender compensation via instrumentalities forfeited to the state via POCA; thirdly, compensation derived from state grants and court witness fees which are facilitated by prosecutors; and, lastly, compensation from African indigenous compensation processes which are facilitated or vetted by prosecutors and the judiciary. Also, at the end of this Chapter, all relevant policy directives are reviewed to demonstrate how institutional overseers, such as the NPA, instruct their personnel in relation to their statutory obligations.

It must also be noted that text based research (in this Chapter) and empirical investigations (in Chapters Seven and Eight) confirmed that although laws are in place to assist victims of sexual violence with their compensatory concerns these laws were persistently overlooked by prosecutors, judges and state-attorneys partly on account of biases. In addition these laws are consistent with the standards set out in The *United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*²⁵⁹ which was adopted by the United Nations General Assembly on 29 November 1985. Bias was suggested as a leading factor for this omission because interviews and case studies confirmed that state role-players did not assist victims of sexual violence because they incorrectly believed that their financial losses were not quantifiable and/or sexual violence victims generally did not want, or need, compensation. Victim surveys

²⁵⁹ *The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* General Assembly Resolution 40/34 (29 November 1985).

undertaken for this thesis rebutted these unfounded assumptions and confirmed that many sexual violence complainants were able to list quantifiable damages relating to both their court appearances and post-assault care, and that some of these victims would accept compensation from offenders and that modest amounts of compensation would be useful.

Furthermore, the conduct of state attorneys, prosecutors and judges, when they overlooked the compensatory concerns of victims, was also deemed discriminatory for two reasons. First, discrimination was evident as state officials ignored the unique concerns of victims of sexual violence by failing to ensure positive measures to assist with the vulnerabilities of sexual violence victims and by pre-empting readily available compensation avenues due to biases which suggested that sexual violence victims did not want or need compensation and they did not have quantifiable losses. In doing so they unnecessarily heightened the disadvantages that sexual violence victims' face, post-assault, because compensation, if awarded, could have assisted these victims with their unique gendered financial losses in relation to court attendances, post assault medical care and security/relocation expenses. Secondly, discrimination was evident as other 'classes' of victims in South Africa were regularly provided with compensatory assistance (namely commercial crime victims and violent crime victims in general) in contrast to sexual violence victims who are predominately female. Again this differentiation (and favoritism) occurred partly on account of the biases held by state officials. Also again, when favoring one class of victims, they unnecessarily heightened the disadvantages that sexual violence victims' face, post-assault, because compensation, if awarded, could have assisted these victims with their unique gendered financial losses in relation to court attendances, post assault medical care and security/relocation expenses.

Also, it is important to point out that interviews and case studies (as outlined in Part 5, chapters 7 and 8) confirmed that South African prosecutors and judges rarely addressed discriminatory patriarchal customary compensation

arrangements (which were arranged by male representatives of the victim's and offender's family) when these customary arrangements arose in sentencing proceedings. Furthermore research confirmed that criminal justice officials did not align customary compensation arrangements with CPA provisions that can provide for incarceration, or other criminal sanctions, when offenders either default on payment, or when offenders improperly direct compensation payments to patriarchal figures that negotiate customary settlements rather than paying compensation directly to victims so they may attend to their recoveries. Furthermore, the foregoing omissions by prosecutors and judges, when they did not utilize CPA provisions, exacerbated victims' vulnerabilities as difficult civil execution methods would have been necessary to enforce customary agreements if offenders reneged on these agreements.

Lastly, it must be noted that interviews and victim surveys also confirmed that prosecutors rarely informed sexual violence victims of available emergency social grants and court administration stipends, when offenders did not provide compensation, despite prosecutors' awareness that many complainant/witnesses had burdensome economic losses that directly related to their gender, such as childcare, pregnancy and security costs.

5.1 Offender compensation in sentencing proceedings

Offender compensation to victims of sexual crime can be ordered in sentencing proceedings in South African courts by way of the following two (2) legal prescriptions:

First, subsection 297(1)(a)(i)(aa) of the *Criminal Procedure Act*,²⁶⁰ whereby a court may suspend the whole or any part of a sentence, for a period not exceeding five years, conditionally on the offender paying compensation to the victim. As the case law confirms, suspended sentences can be combined with a term of immediate incarceration and if an offender defaults on the ordered payments, he/she may be required to serve his/her entire sentence, including the suspended portions.²⁶¹ With regards to offences subject to minimum sentences, subsection 51(5) of the *Criminal Law (Sentencing) Amendment Act*²⁶² prohibits suspending sentences that are subject to minimum sentences²⁶³ (thus eliminating the possibility of a compensation orders in this situation). Regardless compensation can still be provided, by way of suspended sentences under the following circumstances: if the sexual offence in question does not require a minimum sentencing review, as it is an offence that is not subject to the *Criminal*

²⁶⁰ Act 51 of 1977; sub-section 297(1)(a)(i)(aa) states that 'where a court convicts a person of any offence, other than an offence in respect of which any law prescribes a minimum punishment, the court may in its discretion... postpone for a period not exceeding five years the passing of sentence and release the person concerned... on one or more conditions, whether as to... compensation...' {emphasis added by author}.

²⁶¹ Act 51 of 1977, subsections 297(7) and 9(a). Also see *S v Salzwedel and others* [2000] 1 All SA 229 (A) at 237 where the court notes that 'suspending two years of the sentence [while requiring the remaining incarcerate sentence to be kept in force] would constitute an inducement to the respondents to continue to pay into the Guardian Fund...for the benefit of the minor children of the deceased' and *S v Lepale* 1979 (1) SA 117(B) at 118H, where the court notes that using a suspended sentence 'would operate as an inducement to the accused to make speedy repatriation to the injured person consequently saving costs of enforcement of the award.'

²⁶² Act 38 of 2007, sub-section 51(5) provides that "the operation of a minimum sentence imposed in terms of this section shall not be suspended" {emphasis added by author}.

²⁶³ *Director of Public Prosecutions v Thabethe (2)* SACR 567 (SCA) at paragraph 23, confirms that "section 51(5)(a) precludes a sentencing court from suspending a sentence imposed in terms of this Act [and] it follows that the court below erred in having the sentence wholly suspended {emphasis added by author}."

Law (Sentencing) Amendment Act, and therefore the sentence can be fully or partly suspended with a condition of compensation²⁶⁴; and if the court employs section 51(3)(a) of *the Criminal Law (Sentencing) Amendment Act* to deviate from the minimum sentencing regime when substantial and compelling reasons exist and therefore the sentence can be partly suspended with a condition of compensation.²⁶⁵ It is important to note that there is still some confusion on the later exclusion and case law must still settle this point of law in future.²⁶⁶

The second sentencing prescription that facilitates compensation is section 276 of the *Criminal Procedure Act* whereby a court may order the sentence of correctional supervision, which may include the community correction provision of compensation via section 52(1)(e) of the *Correctional Services Act* for a fixed period not exceeding five years.²⁶⁷ If an offender defaults on the ordered

²⁶⁴ For example sentencing proceedings involving one act of statutory rape, for first time offenders are not subject to the minimum sentencing process.

²⁶⁵ Act 38 of 2007, sub-section 51(3)(a). Also note that SS Terblanche (2011:230) confirms that “many judgments have stressed that, also in the case of rape, there is a gradation in the seriousness of the offence [and therefore there can be substantial and compelling reasons to deviate from the minimum sentencing regime].” Also note Vetten et al (2010:23) confirmed in a study of 2068 police dockets in the Gauteng province, that ‘one in seven convicted rapists received less than the then mandated ten years minimum sentence.’

²⁶⁶ Confusion arises due to conflicting opinions in academic writing and in case law. In this regard, Du Toit et al. (2012:28-44) confirm that “where the accused has been convicted of an offence for which a minimum sentence is prescribed only part of the sentence may be suspended” while at (2012:28-47) it is confirmed that “full suspension of a sentence where the legislature prescribes a minimum sentence, is not competent ... [and] where there is a minimum sentence only part thereof may be suspended.” Furthermore Terblanche (2007:72) confirms that “a sentence imposed after a finding that substantial and compelling circumstances... is a sentence imposed in terms of the court’s ordinary sentencing jurisdiction.” This is compared to the views of Tuchten J in *S v Mabena* 2012 (2) SACR 287 (SGHC) who suggested a trial judge erred when he partly suspended a sentence after finding the case was not subject to minimum sentences on account of compelling and substantial reasons. Tuchten J, at 291, paragraph 21, confirmed that “the learned judge was thus precluded from suspending any part of the sentence imposed pursuant to the minimum sentencing regime.”

²⁶⁷ Act 51 of 1977, subsection 276(A), and Act 111 of 1998, subsection 52(1)(e). Bertelsmann et al (2012:12-11 and 12-12) confirm that “correctional supervision is imposed for a maximum period of three years in terms of section 276(1)(h) but in terms of an amendment brought about by the *Criminal Law (Sexual Offences and Related Matters) Amendment Act* 32 of 2007 the period may be extended for five years if this sentencing option is applied to a sexual offence.”

In addition please note the following statutory references:

compensation, subsection 276A(4) of the *Criminal Procedure Act*²⁶⁸ comes into force, which requires the court that rendered the original sentence to reconsider its current suitability and if it is not suitable then change it with a competent sentence. Lastly it is important to note that correctional supervision sentences are not restricted by the *Criminal Law (Sentencing) Amendment Act* (as is the case above with wholly suspended sentences) and it can be combined with other types of sentences so it can be useful in serious, violent crime matters.²⁶⁹ More specifically sentencing courts can, for example, impose a composite term of five years imprisonment in addition to five years correctional supervision pursuant to sections 276(1)(b) and (h), 276(3)(a) and 276A(1)(b) of the *Criminal Procedure*

Criminal Procedure Act

276 (1) Subject to the provisions of this Act and any other law and of the common law, the following sentences may be passed upon a person convicted of an offence, namely...(h) correctional supervision...

Correctional Services Act

51 (1) Persons subject to community corrections are— (a) those placed under correctional supervision in terms of sections...276(1)(h)... of the *Criminal Procedure Act*...

52(1) When community corrections are ordered, a court, Correctional Supervision and Parole Board, the Commissioner or other body which has the statutory authority to do so, may, subject to the limitations in subsection (2) and the qualifications of this Chapter, stipulate that the person concerned... (e) pays compensation or damages to victims...

²⁶⁸ Act 51 of 1977, sub-section 276A(4).

²⁶⁹ Note that subsection 276(3)(a) of the *Criminal Procedure Act* 51 of 1977 provides authority for the use of composite sentences for a single criminal count as it states that 'notwithstanding anything to the contrary in any law contained, [the sentencing options provided]... shall not be construed as prohibiting the court from imposing imprisonment together with correctional supervision.' Therefore, sentencing courts can order both imprisonment and compensation at the same time, for a single charge, relating to a single act of sexual violence, as correctional supervision is a provision of community corrections, per subsection 52(1) of the *Correctional Services Act* 111 of 1998, and this sentencing option in turn provides for compensation via section subsection 52(1)(e).

Also note *S v Stanley* 1996 2 SACR 570 (A) at 575 C where Olivier JA notes that 'one has to look at the whole, composite sentence imposed in order to ascertain whether it was just and appropriate,' and at 575 D, where he notes that 'the question of principle arising in the present case is whether a term of imprisonment suspended on condition that compensation is paid to the complainant can be combined with a sentence of correctional supervision in terms of s276(1)(h) or with a sentence of imprisonment in terms of s276(1)(i) of the *Criminal Procedure Act*,' whereby he concludes at 577 F, in the positive, that 'in my view, there is no justification for interfering with the substance of the sentence imposed by the Court *a quo*.'

Act 51 of 1977.²⁷⁰ In addition, in cases where a charge of rape fails and other 'competent verdicts' are provided for instead which fall outside of the minimum sentencing legislation, the courts can easily accomplish the twin goals of protecting society through lesser periods of incarceration while providing compensation payments to victims. Therefore, an important principle of sentencing is that composite sentences, such as imprisonment combined with compensation orders can be 'just and appropriate.'²⁷¹ This is especially relevant for sexual offences where multiple punishments may be necessary, since the compensation component may only serve one judicial 'purpose' or 'consideration.' In this regard, other orders that could be used in conjunction with compensation could be imprisonment, behavioral and treatment programme requirements, prohibitions from contacting or speaking to certain persons and/or community service.

It is also important to note that suspended sentences and correctional supervision can be applied to sexual offences as these penal sanctions have been employed in other violent crime related matters in the past (namely, crimes involving assault, murder, culpable homicide).²⁷² Further, two authorities can be

²⁷⁰ *S v Holtzhausen* [2002] 1 All SA 445 (A) at 446F. Also note *S v Bangiso* 2013 (1) SACR 558, in case involving procurement of minor children for sex and kidnapping, at 563, where it is confirmed that a court is allowed to "combine, as provided in s276(3)(a) of the Act, any period of imprisonment she deemed fit in the circumstances, which may even be in part suspended, with correctional supervision in terms of s276(1)(h) (*S v Stanely* 1996 (2) SACR 570 (A) at 575d)."

²⁷¹ See *S v Stanley* 1996 2 SACR570 (A) at 575 C where Olivier JA notes that 'one has to look at the whole, composite sentence imposed in order to ascertain whether it was just and appropriate,' and at 575 D, where he notes that 'the question of principle arising in the present case is whether a term of imprisonment suspended on condition that compensation is paid to the complainant can be combined with a sentence of correctional supervision in terms of s276(1)(h) or with a sentence of imprisonment in terms of s276(1)(i) of the Criminal Procedure Act,' whereby he concludes at 577 F, in the positive, that 'in my view, there is no justification for interfering with the substance of the sentence imposed by the Court *a quo*.'

²⁷² - For a case of *assault* see *S v Kotze* 1986 4 SA 241 (C) at 242A, where the court totally suspended a sentence of imprisonment, on the condition of compensation in the case of an assault and robbery perpetrated against a pregnant woman and her husband.
- For cases of *murder* see *S v Potgieter* 1994 (1) SACR 61 (A) and the recent case of *S v Ferreira and others* 2004 (2) SACR 454 (SCA) at 469 para 46 whereby the majority of Supreme Court of Appeal indicated that a sentence without custodial incarceration, wholly suspended on behavior conditions, would have been appropriate for this domestic murder despite the existence of

cited for the common use of these penal sanctions in sexual violence matters today while noting that these below references involved research that was undertaken when minimum sentencing laws were in force.

Firstly, SS Terblanche has affirmed, with regards to the old common law crime of rape, which has subsequently been altered by the new *Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007* that: 'it is by no means inconceivable that some courts would consider rape to be sufficiently punished through a partly suspended sentence, or a prison sentence of substantially less than the five years' after his review of 'case law over the last eight years [up to February 2006].'²⁷³

Secondly, the use of correctional supervision and suspended sentences in sexual violence matters was confirmed by a prosecutor in the NPA's February/March 2012 Khasho Newsletter wherein Advocate Koos Joubert confirmed that "a study of the case law dictates that an option of a fine [which would need to be ordered alongside correctional supervision or suspended sentences, in serious sexual violence matters] was an appropriate sentence for (the old common law crime of) indecent assault."²⁷⁴

Two reported cases are particularly helpful in placing the suspended sentence and correctional supervision compensation sections into perspective, in matters involving sexual violence, and violent crime respectively. These cases confirm the multiple ways that statutory compensation processes can be employed in sexual violence cases and the fact that compensation can be ordered alongside

minimum sentencing provisions when it stated: 'in all circumstances an imprisonment sentence of 6 years would have been appropriate on trial, suspended on conditions.'

- For a case of *culpable homicide* see *S v Dhlamini* 1988 (2) SA 302 (AD) at 310E.

- For a case of *rape* see *S v A and another* 1994 (1) SACR 602 (A).

- For cases of *indecent assault* see *S v W* 1994 (1) SACR 610 (A), *S v R* 1993 (1) SA 476 (A) and *S v Ndaba* 1993 (1) SACR 637 (A).

²⁷³ Terblanche (2006: 34).

²⁷⁴ NPA/Khasho (2012:9).

direct imprisonment, if offenders were previously employed, have assets, or have access to family finances.

Firstly, Plasket J, in *S v Marais* 2009 (1) SACR 299, in a case involving sexual violence, noted that:

‘the only provisions that allow for a criminal court to order the payment of compensation are s 300 of the *Criminal Procedure Act*, s 297(1)(a) and (b) of the same Act, and s 52(1)(e) of the *Correctional Services Act* 111 of 1998. The first of these provisions provides for the payment of compensation in cases in which the offence of which the accused has been convicted caused damage to or loss of property... The second provision allows, inter alia, for the payment of compensation to be made a condition for the postponement or suspension of sentence... [and thirdly] section 52(1) of the *Correctional Services Act* provides for the payment 'of compensation or damages' as one of a number of possible conditions to be attached to a sentence of community corrections, which, in turn, may include a sentence of correctional supervision in terms of s 276(1)(h) or s 276(1) (i) of the *Criminal Procedure Act*.’
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This above review of compensatory options is especially relevant as the case involved sexual violence and it clearly shows that there are various compensatory avenues available within sentencing proceedings. Furthermore correctional supervision, which can be employed alongside incarceration, can be ordered for a period of 5 years, in cases of sexual violence. This is helpful as it allows for long payment schedules so that offenders can have significant periods of time to comply with compensation orders.

Secondly, in *S v Salzwedel and Others* 2000 (1) SA 786 (SCA), the Supreme Court of Appeal ordered compensation for minor children, by way of conditions attached to a partly suspended sentence, after a racially motivated murder. In addition to the offenders receiving a sentence of 10 years imprisonment, the court concluded that, as the offenders were previously employed ‘it should be within their capacity to pay or cause to be paid what are relatively small amounts

²⁷⁵ *S v Marais* 2009 (1) SACR 299 at 307 [22] C to G.

even while they are to be incarcerated with effect from the date of this order.'²⁷⁶ The amounts ordered to be paid by each offender were R50 rand per month up to a total of R3 000. In this case, a suspended sentence was employed to facilitate the compensation order as it was noted that it 'would constitute an inducement to the respondents to continue to pay into the Guardians Fund the installments which Jones J [the sentencing judge] had directed for the benefit of the minor children of the deceased ... [as] it will take nearly three years for each of the respondents to discharge the balance... while they are to be incarcerated.'²⁷⁷ This case confirms the fact that compensation can be ordered alongside direct imprisonment, especially so if offenders were previously employed or have assets. This is extremely pertinent in sexual violence cases as many offenders do have assets to fulfill compensation orders²⁷⁸ and many sexual violence sentences necessarily involve imprisonment.

²⁷⁶ *S v Salzwedel and Others* 2000 (1) SA 786 at 237.

Also note *S v Charlie* 1976 2 SA 596 (A) at 596H whereby the court ordered 'that the three-year period of restitution should commence immediately instead of only on appellant's release from the gaol.'

²⁷⁷ *Ibid.*

²⁷⁸ Research below suggest many offenders can pay compensation:

(i) Rasool et al (2002: 56) cite the following statistics, gathered for their comprehensive nation-wide South African survey, as it relates to sexual violence against women 18 years of age and over: 60% of the sexual abusers studied were working while 8% were working most of the time; 66% had monthly earned incomes of 1000 Rand or more; 30% had monthly income of 4000 Rand or more; and only 14% had no monthly income.

(ii) Andersson et al (2000: 20) note in their survey of 2059 men aged between 13 and 83 years, that 'there was no significant difference in the responses between employed and unemployed men as to whether they had sex with a woman without her consent.'

(iii) Kistner, Fox and Parker (2004: 21) note the prevalence of perpetrators that are employed teachers. The authors state that 'a study conducted by the South African Medical Research Council in 2002 found that...in most of the cases [of child rape], the offenders were found to be teachers (about 33%)', and at 22-23 it is noted that, educators have 'comparatively high incomes.'

(iv) Townsend and Dawes (2004: 69) reveal that 'child abusers come from a variety of backgrounds. This is true for South Africa as well as elsewhere... [researchers have noted] that their experience at Resources Aimed at the Prevention of Child Abuse and Neglect (RAPCAN) proves that rape and child sexual abuse happen amongst all class groups, all racial categories, regardless of affluence, religion, poverty or any other broad societal category.'

This thesis asserts that biases are regrettably obstructing the use of the above two compensatory approaches in cases of sexual violence. In this regard, bias is suggested as a leading factor for this omission because interviews and case studies confirmed that state role-players did not assist victims of sexual violence because they incorrectly believed that their financial losses were not quantifiable and/or sexual violence victims generally did not want, or need, compensation. Victim surveys undertaken for this thesis rebutted these unfounded assumptions and confirmed that many sexual violence complainants were able to list quantifiable damages relating to both their court appearances and post-assault care, and that some of these victims would accept compensation from offenders and that modest amounts of compensation would be useful. Furthermore, this conduct of state attorneys, prosecutors and judges, when they overlooked the compensatory concerns of victims due to biases, was also deemed discriminatory for two reasons.

First, discrimination was evident as state officials ignored the unique concerns of victims of sexual violence by failing to ensure positive measures existed to assist with the vulnerabilities of sexual violence victims due to biases which suggested that sexual violence victims did not want or need compensation and they did not have quantifiable losses. In doing so they unnecessarily heightened the disadvantages that sexual violence victims' face, post-assault, because compensation, if awarded, could have assisted these victims with their unique gendered financial losses in relation to court attendances, post assault medical care and security/relocation expenses.

Secondly, discrimination was evident as other 'classes' of victims in South Africa were regularly provided with compensatory assistance (namely commercial crime victims) in contrast to sexual violence victims who are predominately female. Again this differentiation (and favoritism) occurred partly on account of the gender biases held by state officials who assumed that the specific expenses of sexual violence victims, were superfluous and vague, as compared to the

expenses incurred by other classes of victims. Also, once again, this favoritism of one class of victims unnecessarily heightened the disadvantages that sexual violence victims' face, post-assault, because compensation, if awarded, could have assisted these victims with their unique gendered financial losses in relation to court attendances, post assault medical care and security/relocation expenses.

Furthermore it can be said that the above two discriminatory outcomes of biased decision making were reinforced by institutional overseers. In this regard, the DOJCD, after seven long years of careful deliberation, collaboration and redrafting, incorrectly stated the scope of the compensation provisions that are tied to suspended sentence and correctional supervision in the new Victim's Charter.²⁷⁹ More specifically, the DOJCD asserted that vulnerable victims of violent crime (including sexual assault) can only pursue compensation for loss or damage to property within criminal proceedings despite ample case law and legislation above stating that pecuniary and non-pecuniary losses²⁸⁰ may be requested through suspended sentences and composite sentences, which can combine imprisonment terms with correction supervision compensation orders.

In concluding this subsection it is important to note that in addition to the aforementioned statutory references and case law, two ancillary processes must

²⁷⁹ The Department of Justice and Constitutional Development (DOJCD) *Service Charter for Victims of Crime in South Africa* (December, 2004) at 3 defines "compensation" as "an amount of money that a criminal court awards the victim who has suffered loss or damage to property, including money, as a result of a criminal act or omission by the person convicted of committing the crime." This definition is misleading as it excludes non-property compensation avenues reviewed in this subsection. By way of background also note that the 'Victim's Charter' is the most important governmental decree on victims' rights to be issued in the post-apartheid era and this document will serve to guide victims through the legal system by informing them for the first time of their legal and constitutional rights.

²⁸⁰ - Note *S v Tshondeni* 1971 4 SA 79 (T) and *S v Magkise* 1973 2 SA 493 (O) where the courts ordered pain and suffering compensation awards as part of suspended sentences for the crime of assault with intent to do grievous bodily harm and finally.
-Also note *S v Kotze* 1986 4 SA 241 (C) where a compensation payment was ordered as part of suspended sentence for contumelia, embarrassment and pain and suffering as it related to an assault against a pregnant woman and her husband.

be reviewed, namely, the compilation of 'victim impact reports' and 'correctional supervision reports', both of which assist in sentencing reviews wherein compensation may be provided. These processes are reviewed in the next subsections.

5.1.1 Victim Impact Reports (VIRs)

Victim evidence in sentencing proceedings is most often relayed to the court through 'victim impact reports' (VIRs). In this regard, VIRs are generally completed by government social workers or probation officers²⁸¹, as opposed to victims presenting this evidence directly themselves orally or in an independently authored written statement.²⁸²

In section 70(1) of the CJA "victim impact statement" is defined as "a sworn statement by the victim or someone authorised by the victim to make a statement on behalf of the victim, which reflects the physical, psychological, social, financial or any other consequences of the offence for the victim." This statutory definition is cited for background purposes only (as the CJA is not fully reviewed in this thesis for reasons outlined in subsection 1.3) as the definition confirms financial information is relevant²⁸³ and it provides for the current practice mentioned above whereby social workers deliver statements on the victim's behalf (as many victims do not wish to attend sentencing proceedings or do not wish to testify post-conviction).

²⁸¹ Gxubane (2008:13) notes that 'in South Africa, any person registered with the South African Council of Social Services Professions as a social worker can be employed as a probation officer.'

²⁸² Van der Merwe (2006: 431) confirms that 'in most jurisdictions, victims do not prepare their own statements [and] instead, these are prepared by a specific agency, and, in retelling, the statements become filtered or 'edited', or even 'sterilized', leading rather to an understatement of the harm experienced by a victim.'

On rare occasions, in South Africa, direct victim opinion statements in the form of letters, pictures or poems are accepted by the court in sentencing dispositions with or without the victim attending court for cross examination. Unlike victim impact reports (VIRs) completed by statutory agencies, these direct forms of victim submissions are prepared infrequently by victims on their own accord. In addition, these victim statements can be used by the defense in mitigation of sentence when the victim indicates a favorable account of the offender's personality, irrespective of his crime or culpability thereto, as may happen when parents or non-stranger abuse occurs and victims have conflicting feelings or guilt about punishment.

Also see the National Prosecuting Authority *Sexual Offences Bulletin* Number 5 (2004: 31) 'The Effectiveness of Victim Impact Reports' wherein Jeanette Neveling, Senior State Advocate: DPP, recites how children's poems and pictures were admitted as evidence for purposes of sentencing in an unreported case at the Umtata High Court. Also note *S v Van Wyk* 2000 (1) SACR 45 (C) at 51 for an example of a victim's poem being admitted into evidence for purposes of sentencing.

²⁸³ Van der Merwe (2006:433) also confirms that VIRs can provide an opportunity for victims to request 'payment for counseling and therapy.'

While VIRs can be of assistance in ascertaining the compensatory needs of victims it still must be noted that judges may not always afford great weight to VIRs. In this regard in *Director of Public Prosecutions v Thabethe* (2) SACR 567 (SCA) Bosielo J noted the following:

“a controversial if not intractable question remains: do the views of the victim of a crime have a role to play in the determination of an appropriate sentence [and] if so what weight is to be attached thereto? That the victim's voice deserves to be heard admits no doubt. After all it is the victim who bears the real brunt of the offence committed against him or her. It is only fair that he/she can be heard on amongst other things how the crime has affected him/her. This does not mean however that his/her views are decisive.”²⁸⁴

Also in *S v M* 2007 (2) SACR 60 (W) it is confirmed that:

‘the legislature does not seem to have intended the rapist to be less [or more] morally and legally blameworthy because the rape survivor appears to or actually does survive, or continues life with less apparent trauma’ as it is unfair ‘to the rapist that his fate should depend upon the differences in opportunities, psyches, physical strength, age, family or other support available to different rape survivors, and which result in different manifestations of trauma.’²⁸⁵

With the above proviso in mind it is important to recall, as is reviewed in subsection 5.1, that judges have a great deal of flexibility in sentencing and they should not unnecessarily pre-empt the compensation concerns of victims. In this regard, sentences can combine severe incarcerate provisions alongside compensation (should offenders have means or have been previously employed) and as such the law can be applied to serve both deterrent and retributive purposes in addition to paying heed to the concerns of society in general (and victims concern in particular). Therefore, it is important that prosecutors advise victims of the importance of VIRs and ensure they present to the court meaningful evidence on the economic losses resulting from victimization (including the various heads of damages noted in the survey results in Chapter 8). Moreover, should compensation by offenders be arranged it can be a

²⁸⁴ *Director of Public Prosecutions v Thabethe* (2) SACR 567 (SCA) at paragraph 21.

²⁸⁵ *S v M* 2007 (2) SACR 60 (W) at 89.

mitigating factor ²⁸⁶ and prosecutors are obliged to present both aggravating and mitigating factors to the court.

This thesis argues that biases are obstructing the use of compensatory approaches in cases of sexual violence and the increased use of VIRs may not dislodge these stereotypes. Therefore the DOJCD and NPA must educate role-players on the importance of VIRs in relation to presenting economic losses to the court.

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²⁸⁶ In the SALRC Report (2004: 161, paragraph 6.13) it is confirmed by M de Kok, Regional Court Magistrate, that “in terms of section 297(1)(b) of the CPA, court can impose a suspended sentence on condition that the victim be compensated for damages, and if the accused is prepared to pay compensation, the court can take it into account in mitigation of sentence.”

5.1.2 Correctional Supervision Reports (CSRs)

'Correctional supervision reports' (CSRs) are used to assess the suitability of the sentence of 'correctional supervision,' which can include a community correction order requiring victim compensation.

Regarding the sentence of 'correctional supervision', SS Terblanche in his authoritative book *Guide to Sentencing in South Africa* (2007), confirms it 'is a form of punishment which does not remove the offender from the community in which he lives and works' and therefore a convicted offender can continue with employment and familial responsibilities if appropriate.²⁸⁷

Correctional supervision can also be employed in sexual offences cases. In this regard, the use of correctional supervision sentences in sexual violence matters was confirmed by a Correctional Supervision Officer in Cape Town, who was interviewed in 2006 for this thesis, when he noted that:

"...specifically here in Khayelitsha from Regional Court 'A' [the Sexual Offences Court] I get quite a lot [of requests to submit correctional supervision reports], plus minus maybe 6 or 7 per month approximately... [and] I can say plus minus three, they get correctional supervision."²⁸⁸

²⁸⁷ Terblanche (2007:279). Also note Gibson (1997: 78) confirming that:

'correctional supervision was no picnic for an offender. It was like house arrest under stringent conditions. It enabled offenders to remain in the community and continue working, but that was about all. It limited heavily their social life and activities. It kept them pinned at home after dark. It made them subject to unexpected phone calls or visits from Department of Correctional Services' officers at any time of the day or night. It obliged them to do community service. Some experts believed that, through correctional supervision seemed more lenient than prison; it was a slow-acting punishment that grew more onerous and unpleasant as the days went by. But at least the victim wasn't incarcerated in a state institution. It wasn't jail.'

Finally note Roberts (2006:30) confirming that most common law jurisdictions have adopted a sanction resembling the conditional sentence of imprisonment [and] a term of custody served in the community is therefore hardly a novel sanction.'

²⁸⁸ Interview with Cape Town Corrections Officer (2006) transcript on file with author.

Regarding administrative matters, SS Terblanche, confirms that 'the Act is silent regarding the content of the report... [but] most of the judgments stipulated that the [Correctional Supervision] report should refer to the conditions that should be attached to the particular offender's sentence of correctional supervision and how these conditions can be utilized to achieve the objects of sentence.'²⁸⁹ Despite the absence of prescriptions/regulations in terms of the contents of CSRs, most of the Cape Town local correctional officials interviewed for this research did have a standard form as approved by their local office.

In addition, CSRs may also be prepared by probation officers. SS Terblanche notes that 'a probation officer is a person appointed in terms of the Probation Services Act of 1991 and... should be limited to civil servants.'²⁹⁰ With this in mind, officials from the Department of Correctional Services staff currently complete CSRs in the Western Cape and moreover CSRs are 'normally provided by the courts' local correctional officials.'²⁹¹

SS Terblanche notes the following, in relation to the specific role of probation officers:

'...they are important role-players in the sentencing process... they are particularly well placed to provide the court with information, by way of pre-sentence reports, about the accused. These reports usually contain information about the offender's childhood, schooling and employment history. They often attempt to explain why the offender committed the crime and include suggestions on sentences which suggestions may be useful in the particular circumstances of the case.'²⁹²

Finally, it is important to note that most judges do appreciate the important role that CSRs play in sentencing matters. In this regard Justice C M Somyalo, Judge President, Eastern Cape High Court Division, confirmed the importance of CSRs when referencing a past decision of the court, in a sexual violence matter.

²⁸⁹ Terblanche (2007:293).

²⁹⁰ Terblanche (2007:338, footnote 9).

²⁹¹ Terblanche (2007:292).

²⁹² Terblanche (2007:119).

He noted that the decision to submit the offender to correctional supervision was grounded on fact as it “was based on the uncontested evidence of a probation officer who, having interviewed the appellant, members of his family, and his victim, testified as to the merits of a conditional sentence.”²⁹³

The overall conclusion reached in this subsection, regarding compensatory processes within criminal sentencing proceedings, is that it is clear that the criminal justice system has the necessary machinery and statutory authority to provide compensation to victims of sexual violence via the CPA/CSA while also ensuring offenders are provided due process. Unfortunately, it is asserted that biases are partly to blame for the lack of use of these available provisions.

²⁹³ Justice C M Somyalo ‘Judges expect criticism to be based on solid facts’ *Sunday Times Newspaper* 16 March 2008 at 19.

5.2 Alleged offenders and civil forfeiture compensation processes

This section will provide information on POCA processes in general before reviewing how victims of sexual violence in particular can obtain compensation via civil forfeiture applications. At the outset, it is important to note that POCA contains two types of state seizure schemes and elaboration is provided on this division as the NPA suggests that victims' standings and rights are dependent on the type of scheme employed (the author rebuts this contention later in this thesis in the case study in subsection 7.2.6).

The two POCA schemes are as follows:

- A non-conviction based civil forfeiture scheme that allows the government to seize instruments of crime, on a balance of probabilities (for example a house used to facilitate or hide sexual violence). It is important to note that this thesis focuses on this compensatory processes only²⁹⁴; and,
- A post-conviction based confiscation scheme for proceeds of crime, (for example currency or real property derived from the proceeds of illegal crime such as trafficking or prostitution activities).

Since both schemes are contained in POCA, they have similar legislative goals and policy objectives, namely the reduction of violent and non-violent crime by removing the tools of crime, and the incentives of crime, through government seizures.²⁹⁵ Furthermore, victims are provided with unique non-party status in

²⁹⁴ The civil forfeiture scheme is reviewed, and not the confiscation scheme, because this thesis focuses on sexual violence against individuals and their compensatory rights. In this regard, forfeiture can be used to seize instruments such as houses wherein pedophiles abuse children. Conversely the confiscation scheme involves proceeds of crime, or fruits crime, and therefore involves organized sexual exploitation of numerous victims (such as prostitution rings, pornography syndicates and trafficking groups), which is not the focus of this thesis.

²⁹⁵ POCA's preamble confirms that one legislative priority is to attend to "the right of every person to be protected from fear, intimidation and physical harm caused by the criminal activities of violent gangs and individuals." Furthermore Steinberg (2007:299) confirms that 'the justice department drafted the law in the late 1990's [and] at precisely that time, the legislature had begun in earnest to throw the kitchen sink at South Africa's crime wave [and] it had just passed a

both types of proceedings if they assert an interest in the instruments or proceeds sequestered with interest defined as “any right” in POCA subsection 1(1)(viii).²⁹⁶ In this regard, victim standing is included in both POCA schemes as seized funds/assets are handed over to the government if victims with priority standing are not located. More specifically, in both schemes, the legislature and the NPA intended to ensure that victims could assert a priority claim, ahead of government, in relation to proceeds and instruments involved in their victimizations. With the above in mind, the NPA ensures that victim compensation in both schemes is targeted in performance measures.²⁹⁷

sentencing law that would drastically inflate the time felons spent in jail [and] it had also passed and extraordinarily harsh new bail law.’

²⁹⁶ Act 121 of 1998, subsection 1(1)(viii).

Also note the POCA sections dealing with third party/complainant claims below while noting the author’s emphasises in bold:

Post confiscation processes – conviction based scheme

30(3) A High Court shall not exercise its powers under subsection (2)(b) unless it has afforded all persons known to have **any interest** in the property concerned an opportunity to make representations to it in connection with the realisation of that property....

30(5) If the Court is satisfied that a person who has suffered damage to or loss of **property or injury** as a result of an offence or related criminal activity...

(a) has instituted civil proceedings or **intends to institute** such proceedings within a reasonable time: or

(b) has obtained a judgment against the defendant in respect of that damage, loss or injury: the court may order that the *curator bonis* suspend the realisation of the whole or part of the realizable property concerned for the period that the court deems fit in order to satisfy such a claim or judgment and related legal expenses and may make such ancillary orders as it deems expedient.

Post forfeiture processes – non-conviction based scheme

52(1) The High Court may, on application—

... (b)... when it makes a forfeiture order, make an order **excluding certain interests** in property which is subject to the order, from the operation thereof.

(2) The High Court may make an order... if it finds on a balance of probabilities that the applicant for such an order—

(a) had acquired the interest concerned legally; and

(b) neither knew nor had reasonable grounds to suspect that the property in which the interest is held—

(i) is an **instrumentality** of an offence referred to in Schedule 1: or

(ii) is the **proceeds** of unlawful activities.

²⁹⁷ National Prosecuting Authority *Quarterly Performance Overview Report of Public Prosecutions – Quarter 2 – 2011/12* at 29 where it is confirmed that the NPA benchmarks its performance regarding compensatory ‘orders in terms of POCA where a person has suffered damage to or loss of property or injury as a result of an offence or related criminal activity (sec 30 of POCA) or the exclusion of property from a forfeiture order to pay a victim (sec 52 of POCA).’

The above victim centered approach is also consistent with practices in other jurisdictions – for example, the Ontario regime, in Canada, which ensures that victims have priority access to compensation, in relation to forfeited instruments used in their victimizations.²⁹⁸

With regard to the non-conviction based, civil forfeiture scheme, which is focused upon in this thesis, it is important to note that POCA defines an ‘instrumentality of an offence’ as ‘any property which is concerned in the commission or suspected commission of an offence’ and ‘Schedule One’ of the Act lists numerous offences of a sexual nature, for which forfeiture provisions apply.²⁹⁹ In this regard, in the case study reviewed in subsection 7.2.6, the court concluded that instrumentalities can include a dwelling and car wherein assaults of a sexual nature took place.³⁰⁰

²⁹⁸ See subsection 7.2.6 for a full review of the Ontario forfeiture scheme in relation to victim compensation.

²⁹⁹ Act 121 of 1998, subsection 1(1)(v) and Schedule 1.

³⁰⁰ In the case study, in subsection 7.2.6, the *Founding Affidavit in the Application for Forfeiture Order* of Adrian Carl Mopp, Deputy Director of Public Prosecutions (DDPP) (19 April 2007) was used to obtain a preservation order (which proceeds forfeiture applications) for a house and car wherein a pedophile sexually abused minor children. In this regard in paragraph 26 it was confirmed that:

‘The seriousness of the offences is underscored by the fact that the lawgiver, in Schedule 1 of the Act, has specifically rendered property which is an instrumentality of indecent assault; and the statutory offences of: unlawful carnal intercourse with a girl under a specified age; committing an immoral or indecent act with a girl or boy under a specified age; and soliciting or enticing a girl or boy to the commission of an immoral or indecent act liable to forfeiture.’

Also note paragraph 27 wherein the DDPP confirmed that: ‘it will also be argued that this application [for preservation of an alleged pedophile’s assets] falls to be considered in the light of the provisions of s 28(2) of the Constitution which provides that a child’s best interests are of paramount importance in every matter concerning the child.’

Finally note two cases from outside South Africa wherein forfeiture provisions were used to address individual cases of sexual violence and human trafficking that were not connected to organized crime:

Firstly, *The Queen v Robert Garner* (unreported case of the Australian County Court, Melbourne (26 April 1999) where J Kelly confirmed in the transcripts of proceedings, on file with the author, that forfeiture provisions should be used to seize a houseboat wherein sexual violence occurred. In this regard J Kelly confirmed:

[at 77] “The prisoner is a wealthy, homosexual pedophile. A successful business as an insurance agent and financial adviser provided him with the wherewithal to live in a sizeable house with a swimming pool, to keep a houseboat on Lake Eildon

In terms of procedure, civil forfeiture is completed by way of civil application brought by a sole Applicant, namely the Director of Public Prosecutions on behalf of the State, without a conviction, and on a balance of probabilities. There is no *viva voce* evidence required and therefore the application is pleaded by way of notice of motions, heads of argument and affidavits. Moreover, forfeiture matters are heard in High Court and the Asset Forfeiture Unit (AFU) of the NPA instructs their legal representatives, namely the State Attorney.

The civil forfeiture process involves three stages:

- First, a preservation order is sought by the State to freeze and preserve the instrumentalities of crime (so they are not improperly disposed of pending a final forfeiture application) and a *curator bonis* is appointed to safeguard and value the assets;
- Second, a final forfeiture order is sought by the state;
- Third, if the forfeiture order is granted by the court, the instrumentalities are liquidated by the *curator bonis* and separated as follows:

and to purchase motor bikes and camping and aquatic equipment. His propensity to seek the company of adolescent males was effectuated by his ability to provide them with a pleasurable environment and exciting activities. Having created the opportunity to do so, he seduced five such children into sexual misbehavior”

[at 83] “I propose to grant the application for a forfeiture order encompassing forfeiture of the houseboat, the present valuation of which is \$110,000. To do so is, in my opinion, just in this case, because I regard its use not as a mere incident of the crimes, or as providing a locus for them, but as an efficient tool of seduction of the boys and of their parents in tempting them to trust him to provide apparently healthy activities for their children. Nevertheless, the loss of a valuable asset is a factor I take into account as part of the sentencing consideration.”

Secondly, The Director of Civil Forfeiture and Ladha (a sub-judice unreported case in the Supreme Court of British Columbia) wherein the Notice of Civil Claim (25 August 2011), on file with the author, at paragraph 12 and 13, confirms, in a case of forced confinement of a house maid from Tanzania who worked as a domestic worker in Canada, that “as a result of an investigation undertaken by the Royal Canadian Mounted Police [the Defendants] are currently charged with unlawful activity in relation to human trafficking and exploitation [and] the Director says that the Property [in question] is an instrument of unlawful activity... because it was used as an instrument in the facilitation of human trafficking.”

- ‘excludable interests’ (as discussed below), tariffs, rates and taxes are provided to third parties, with or without a court order specifying payment of these items, in the ordinary course;
- the remaining monies are placed in a State account, called the Criminal Asset Recovery Account (CARA) and these funds can thereafter be used to assist law enforcement agencies and organizations that assist victims of crime, but not individual victims.

Individual compensation entitlements in sexual violence matters are relevant in civil forfeiture proceedings for the below three reasons:

First, the State Attorney has confirmed in correspondence to the author that ‘the Asset Forfeiture Unit [of the National Prosecuting Authority] has no objection in the case of a forfeiture order being granted to use the proceeds of the sale of the property to pay the victims [of sexual violence] if they are successful in obtaining a civil judgment against the perpetrator.’³⁰¹ Thus, an informal precedent now exists whereby forfeited assets can be used to satisfy civil judgments of sexual violence complainants, be they on account of default judgment or otherwise. This is relevant as the AFU can or should make provisions or set policy, in cases of sexual violence, that should a successful forfeiture order be obtained, proceeds from assets/instrumentalities be held in trust, as excludable property for victims, for a limited period, pending a civil action. Victims would likely obtain default civil judgments, as alleged offenders may not defend related civil actions, as their executable instrumentality may be lost to the State in any event, in the civil forfeiture process, and therefore retaining legal assistance would be a useless expenditure. The most important aspect of this component of forfeiture is that processes can be put in place, at the State’s expense, as it is the sole Applicant in the proceeding, to sequester an asset for sexual assault complainants. As noted by M Gallant, referencing the Ontario civil forfeiture regime and the importance of execution by the State:

³⁰¹ State Attorney, second report to the Western Cape Law Society regarding a complaint by Bryant Greenbaum (11 September 2008) on file with author. See report in Appendix 3.

‘...a civil judgment ordinarily requires enforcement action: the location of a defendant’s property and the execution of the judgment against that property. Forfeiture obviates the need for any additional tier of proceedings: the process attaches liability and, through the termination of interests, operates as the [immediate] instrument of execution.’³⁰²

Second, section 39(3) of POCA prescribes a process whereby a complainant can ‘apply [to the court] for an order excluding his or her interest in the [preserved] property [that is subject to forfeiture proceedings]’³⁰³, from that of the State’s interest. With this in mind, victims of sexual violence who send demand letters, or issue pleadings, or have unsatisfied judgments for civil damages, may claim that they have an ‘excludable interest’ as they have pending litigation (or judgments) against the owners of the instrumentalities, for the same criminal matter. The Court can then order that such ‘excludable interests’ must go to complainants when the final forfeiture order is granted, even if a civil judgment is not in place (as is frequently done by the NPA when proceeds of crime are involved) while the remaining portion of the instrument/property must go to CARA.

The third reason why individual victims’ compensation entitlements are relevant in forfeiture processes is that civil settlements can occur within the forfeiture proceedings and if victims assert an interest in the instrumentalities in question (having issued a demand letter, in relation to the instrumentalities involved, irrespective of a final civil judgment), they could have input into any agreements reached in preservation or forfeiture applications. With this in mind the Office of the National Director of Public Prosecutions has confirmed that ‘the Asset Forfeiture Unit (AFU) settles disputes regularly after weighing up its prospects of success in the court, the costs involved in the litigation and the extent to which it can devote its limited resources to litigation other matters’ and ‘although

³⁰² Gallant (2006: 69).

³⁰³ POCA, subsection 39(3).

settlements in civil matters are often kept confidential, the AFU has a policy of not doing so.’³⁰⁴

This thesis asserts that, unfortunately, biases are obstructing the use of the afore-mentioned POCA compensatory approaches in cases of sexual violence. In this regard, bias is suggested as a leading factor for this omission because interviews and case studies confirmed that state role-players did not assist victims of sexual violence because they incorrectly believed that their financial losses were not quantifiable and/or sexual violence victims generally did not want, or need, compensation. Victim surveys undertaken for this thesis rebutted these unfounded assumptions and confirmed that many sexual violence complainants were able to list quantifiable damages relating to both their court appearances and post-assault care, and that some of these victims would accept compensation from offenders and that modest amounts of compensation would be useful.

Furthermore, this conduct of state attorneys, prosecutors and judges, when they overlooked the compensatory concerns of victims in civil forfeiture cases, is deemed discriminatory for two reasons. First, discrimination was evident as state officials ignored the unique concerns of victims of sexual violence by failing to implement positive measures to address the gendered vulnerabilities of victims of sexual violence. In doing so they unnecessarily heightened the disadvantages that sexual violence victims’ face, post-assault, because compensation, if awarded, could have assisted these victims with their unique gendered financial losses in relation to court attendances, post assault medical care and security/relocation expenses. Secondly, discrimination was evident as other ‘classes’ of victims in South Africa were regularly provided with compensatory assistance (namely commercial crime victims) in contrast to sexual violence victims who are predominately female. Again this differentiation (and favoritism)

³⁰⁴ Office of the National Director of Public Prosecutions *Media Statement* ‘NPA Settlement with Schabir Shaik’ (22 January 2009).

occurred partly on account of the gender biases held by state officials who assumed that the specific expenses of sexual violence victims, were superfluous and vague, as compared to the expenses incurred by other classes of victims. Also, once again, when favoritism occurred, this unnecessarily heightened the disadvantages that sexual violence victims' face, post-assault, because compensation, if awarded, could have assisted these victims with their unique gendered financial losses in relation to court attendances, post assault medical care and security/relocation expenses.

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5.3 Government grants and stipends from the court

Two (2) state benefits are reviewed in this subsection, firstly the Social Relief of Distress Grant (SRDG), and secondly, court witness stipends (CWS), that are provided to witnesses for transportation, lost earnings and other ancillary costs incurred to attend court. Both of these compensatory sources can be accessed by victims of sexual violence but, as research in this thesis suggest, victims require prosecutorial assistance to obtain these subsidies as they are often unaware of these sources of state assistance and how to apply for them. With this in mind, prosecutors should assist victims of sexual violence with applications, referral information and supporting letters, when they visit NPA officials for pre-trial consultations, witness preparation sessions, and trial/sentencing proceedings. To do otherwise can result in discriminatory outcomes, as this omission can exacerbate the financial vulnerabilities of victim of sexual violence because compensation could have assisted with their post assault economic losses involving court attendance and medical services. This position is taken while referencing the NPA's Code of Conduct³⁰⁵ which confirms the following:

- Part D (Role in Administration of Justice), Paragraph 2(c) – “Prosecutors should...consider the views, legitimate interests and possible concerns of victims and witnesses when their personal interests are, or might be, affected, and endeavor to ensure that victims and witnesses are informed

³⁰⁵ *Code of Conduct for Members of the National Prosecuting Authority Under Section 22(6) of the National Prosecuting Authority Act 32 of 1998* (Government Gazette 33907 on 29 December 2010 from DOJCD). This policy was put into effect 18 October 2010.

The Code notes the following in the Preamble: “section 22(6)(a) of the *National Prosecuting Authority Act 32 of 1998* provides for a Code of Conduct to be framed by the National Director of Public Prosecutions, which should be complied with by all members of the Prosecuting Authority”; and “in framing this Code... due account was taken, inter alia, of the values and principles enshrined in the *Constitution of the Republic of South Africa 1996*, the aims to be achieved as set out in the [National Prosecuting Authority] Act, the United Nations *Guidelines on the Role of Prosecutors* as well as the *Standards of Professional Responsibility and Statement of Essential Duties and Rights of Prosecutors* developed by the International Association of Prosecutors as tabled at the 17th session of the UN Commission on Crime Prevention and Criminal Justice.”

of their rights, especially with reference to the possibility, if any, of victim compensation...”;³⁰⁶

- Part E (Co-Operation) paragraph (a): “in order to ensure the fairness and effectiveness of the prosecution process, prosecutors should...co-operate with...any relevant government agencies...”³⁰⁷

With respect to the SRDG, this important government subsidy can be provided to persons experiencing unexpected financial hardship. It is prescribed under Regulation and is overseen by the South African Social Assistance Agency (SASAA).³⁰⁸ To illustrate the broad range of matters the SRDG can be applied to, the author completed a random search of SRDG applications at the Western Cape SASA³⁰⁹ warehouse on 17 June 2011.³¹⁰ This search confirmed that the SRDG has previously been used in the following cases:

- R960.00 in 2008 was provided to a woman who was temporarily unfit to work and could not support herself or her dependants;³¹¹ and,

³⁰⁶ Ibid, Part D (Role in Administration of Justice), Paragraph 2(c).

³⁰⁷ Ibid, Part E (Co-Operation) paragraph (a).

³⁰⁸ Regulation No R 898 of the Social Assistance Act No. 13 of 2004 (22 August 2008).

³⁰⁹ The South African Social Security Agency is the government body tasked with administering social grants.

³¹⁰ Access to the SRDG files was approved in a letter from General Manager: Grant Administration, SASA Western Cape (19 April 2011) on file with author. In this correspondence it was also confirmed that ‘SASSA Western Cape does not keep such detailed records which will indicate [victims of crime who received SRDG so a random search of individual files is necessary to obtain information on this].’

Also it was noted in the correspondence that a Special SRDG Project was completed in the Western Cape to locate families experiencing undue financial hardship and that: ‘there is a Service Level Agreement in place between SASA Western Cape and the Provincial Department of Social Development (PDOSD) and as per the agreement the PDOSD would identify persons who find themselves in a situation of undue hardship [and] a social worker from PDOSD will assess the person’s circumstances and will make a recommendation.’ Finally it was confirmed that in the 2010/2011 fiscal year over three million Rand was allocated for the Special SRDG Project and 3 257 persons were provided with financial assistance.

³¹¹ Western Cape South African Social Assistance Agency application (2008) reviewed by author at SASA Western Cape.

- R290.00 was provided to a child, in 2006 to transport him home after he independently travelled to Cape Town from Durban with friends.³¹²

Furthermore the SRDG grant is available to the following potentially broad range of groups of persons, according to the Regulations:

- Dependents of a breadwinner admitted to prison;³¹³
- Persons affected by natural disasters;³¹⁴
- Persons experiencing undue financial hardship.³¹⁵

The above case examples and classes of persons, confirm the potential flexibility and adaptability of this grant and with this in mind, it is asserted that indigent victims of sexual violence who experience financial hardship on account of post-assault economic losses could benefit from this important government grant. The author therefore suggests that prosecutors should facilitate applications by providing contact information and supporting letters, where appropriate.

Regrettably, research conducted for this thesis has confirmed that the SRDG is rarely accessed by sexual assault complainants who cooperate with law enforcement and who experience desperate post-assault financial difficulties on account gendered concerns such as security upgrades, child care expenses, and health related costs. In this regard, in response to a National Assembly question, submitted by the Independent Democrats, a parliamentary opposition party, on the author's behalf, the DOJCD confirmed that 'approximately 10 people per year are referred to the Department of Social Development [by the National

³¹² Western Cape South African Social Assistance Agency application (2006) reviewed by author at SASSA Western Cape.

³¹³ Regulation No R 898 of the Social Assistance Act No. 13 of 2004 (22 August 2008), subsection 9(1)(b)(v) while subsection 15(1)(d) requires 'proof of admission of his or her spouse to a prison'.

³¹⁴ Regulation No R 898 of the Social Assistance Act No. 13 of 2004 (22 August 2008), subsection 9(1)(b)(vi).

³¹⁵ Regulation No R 898 of the Social Assistance Act No. 13 of 2004 (22 August 2008), subsection 9(1)(b)(vii).

Prosecuting Authority] for grant applications' and these applications 'are accompanied by letters from psychologists who have counseled the complainants.'³¹⁶ Further, the DOJCD confirmed that 'victim assistance officers, court preparation officers and prosecutors are trained to assist victims [with SRDG applications] and do their best in this regard.'³¹⁷ However, when one compares 10 persons to the total number of sexual violence cases the NPA deals with it is clear that very few of these victims are assisted with SRDG.³¹⁸ Additionally, none of the forty-seven (47) respondents who participated in the victim surveys, as described in Chapter Eight, identified receipt of the SRDG despite the fact that many of these complainants reported post-assault financial challenges that directly related to their gender and victimization.

In terms of court stipends, pursuant to Regulation 2 of the *Tariff of Allowances Payable to Witnesses in Criminal Cases* the court can provide R20.00 attendance fee per day plus reasonable transportation cost per individual.³¹⁹ Accompanying adults can also obtain stipends.³²⁰ Victims must complete the J49 Form and attach travel receipts and court subpoena and have the prosecutor sign the form.³²¹ Moreover, pursuant to Regulation 2 of the *Tariff of Allowances Payable to Witnesses in Criminal Cases* the court can provide for lost wages when a witness is subpoenaed. In this regard the regulation states that court

³¹⁶ Parliament of South Africa, *Internal Question Paper*, No. 1-2008, Question N353ENG, (8 February 2008).

³¹⁷ Ibid

³¹⁸ The latest public statistics on the number of sexual offences cases that are finalized by the National Prosecuting Authority is approximately 11 142 annually as noted in the National Prosecuting Authority *Quarterly Performance Overview Report of Public Prosecutions – Quarter 2 – 2011/12* Table 4: Progress on Quarterly Targets Relating to Strategic Objective 1: Increased successful prosecution of serious reported crime, at 13.

³¹⁹ DOJCD, Government Gazette No. 30953(11 April 2008) Regulation 391 of the Criminal Procedure Act (51/1977): Regulations prescribing the tariff of allowances payable to witnesses in criminal proceedings at subsections 2(1)(b)(i) and 3.

³²⁰ Section 191 (5) of the Criminal Procedure Act (Act 51 of 1977) provides for a person who is necessarily required to accompany any witness on account of youth, old age or infirmity and witness allowance may be paid to such person.

³²¹ DOJCD Financial Instructions (2006 update) Chapter 23.

administration can 'order the payment of an allowance equal to the actual amount of income so forfeited, subject to a maximum of R1 500.00 per day.'³²² If employed, victims must complete the J331 Form and attach salary advice and letter from employer, or if self-employed, for example in the informal economy, a statement of income/expenditure along with SARS filings, and a statement explaining the applicant's financial position.³²³

Again, it is important to note that none of the forty-seven (47) respondents who participated in the victim surveys for this thesis identified receipt of a court stipend despite the fact that many of these complainants attended court and had post-assault financial challenges that directly related to their gender and victimization.

Interviews and victim surveys for this research confirmed that prosecutors rarely informed sexual violence victims of available emergency social grants and court administration stipends, when offender compensation was not possible, despite prosecutors' awareness that many complainant/witnesses had burdensome economic losses that directly related to their gender, such as childcare, pregnancy and security costs.

This thesis asserts that biases are obstructing the use of the above-mentioned compensatory approaches in cases of sexual violence. In this regard, bias is suggested as a leading factor for this omission because interviews confirmed that state role-players did not assist victims of sexual violence with SRDGs or CWSs because they incorrectly believed: that their financial losses were not quantifiable; that they generally did not want, or need, compensation; and that many alleged complainants would make false claims in order to receive state benefits. Victim surveys undertaken for this thesis rebutted these unfounded

³²² DOJCD, Government Gazette No. 30953(11 April 2008) Regulation 391 of the Criminal Procedure Act (51/1977): Regulations prescribing the tariff of allowances payable to witnesses in criminal proceedings at subsection 4.

³²³ DOJCD witness remuneration information document (2011) on file with author.

assumptions and confirmed that many sexual violence complainants were able to list quantifiable damages relating to both their court appearances and post-assault care, and that some of these victims would accept compensation from offenders and that modest amounts of compensation would be useful.

Furthermore, this conduct of prosecutors and judges, when they overlooked the compensatory concerns of victims, was also deemed discriminatory. In this regard, discrimination was evident as state officials ignored the unique concerns of victims of sexual violence, and preempted readily available compensation avenues due to biases which suggested that sexual violence victims did not want or need compensation and they did not have quantifiable losses. In doing so they unnecessarily heightened the disadvantages that sexual violence victims' face, post-assault, because compensation, if awarded, could have assisted these victims with their unique gendered financial losses in relation to court attendances, post assault medical care and security/relocation expenses.

5.4 Customary and indigenous compensation processes

The issue of customary compensation is fully reviewed in the next Chapter so this subsection will only briefly review this compensatory process.

To begin, customary compensation arrangements often take place in South Africa alongside sentencing proceedings, in full view of state role-players; as such, these arrangements are often cited as mitigating factors when sentences are deliberated upon.

The customary practices in question include the following:

- Cleansing ceremonies;³²⁴
- Financial negotiations for damages under the customary law of sexual delicts;³²⁵
- Financial considerations when *lobolo* is returned to the husband's family after an allegation of sexual misconduct or when compensation is improperly offered by an (alleged) offender after a (alleged) sexual

³²⁴ South African Human Rights Commission *Report on the Enquiry into Sexual Violence against Children; Does the Criminal Justice System Protect Children?* (2002: 42) confirms that 'adults are reported to sometimes not pursue a report of sexual abuse by a child owing to social or cultural reasons e.g. where the parties opt to resolve the matters between themselves. Mothers often give false/wrong addresses when they do not want the perpetrators to be arrested. This often happens where the perpetrator is willing to pay some kind of compensation to the victim's family. Such compensation may include slaughtering a goat to cleanse the family of the misfortune that has befallen them.'

³²⁵ Labuschagne and Van den Heever (2002) list the following customary law sexual delicts: defloration of an unmarried girl, the common law action for seduction, impregnation of an unmarried girl, adultery, sexual intercourse and impregnation of a women in an *ukugena* relationship, sexual intercourse and impregnation of widows and divorced men. In addition, they confirm that in customary law 'a virgin who has been raped may also be a victim of defloration [of an unmarried girl]' and therefore subject to delictual liability (Labuschagne and Van den Heever 2002: 83). Also, Townsend and Dawes confirm that certain cultural groups in South Africa 'practice *inhlawulo* and *ukugeza*, [which] stipulates that where a man impregnates a woman outside of wedlock, he is obliged to make payments of either money or livestock to the woman's father or guardian as a token of recognition of responsibility and good faith... [and this] same practice is extended to non-consensual sexual relations between adults and children.' (2004: 66).

assault.³²⁶ In this regard, possible concerns about the physical safety of the survivor may arise as the complainant's own family may punish a victim for hardships involved due to the return of the *lobolo*, be it in currency or livestock.³²⁷

In order to ensure adherence to the constitutional principles of equality and security of persons (as outlined in Chapter Two), it is suggested that proper prosecutorial and judicial oversight is necessary to supervise these financial settlements, when they arise alongside sentencing dispositions, as it is common for the male figures that negotiate these settlements to subsume the settlement monies for their own purposes to the detriment of victims.³²⁸ In addition, prosecutorial and judicial oversight of these customary arrangements is also necessary, as noted in Case Study Three in subsection 7.2.3, to ensure that customary settlements become incorporated into terms of sentence such that the offender will be induced to pay compensation settlements or face criminal sanctions upon default.

Research in Chapters Seven and Eight suggests that proper judicial and prosecutorial oversight is often not provided, partly due to biases that are held by

³²⁶ Bowman and Kuenyehia (2003: 331 and 360) confirm that 'in traditional societies knowledge of a daughter's rape may also diminish the bride price that can be demanded for her, thus causing the family not to report the rape' and 'traditionally, the remedies for rape have been compensation to the girl's family... [as] damages are essentially for the reduction in value of the girl in terms of marriage and are paid not to her but to her family.'

Also note the case of *S v Zuma* 2006 (2) SACR 191 (W) concerning the previous rape acquittal of the President of South Africa. In this matter Zuma stated in evidence that he offered to pay *lobola* to the complainant, in furtherance of marriage, while asserting his innocence.

³²⁷ Mbatha, Moosa and Bonthuys (2007: 175) confirm that 'the fear of having to return the lobolo to her husband could contribute to a women's family discouraging her from leaving an unsatisfactory and possibly violent marriage.'

³²⁸ See interviews in subsection 7.1.2 and survey findings in subsection 8.4. Also note Mosoetsa (2011) in relation to research conducted in KZN and Mpumalanga, confirms at 65, 132 and 133 respectively, that 'cultural tradition tends to keep women subordinate to their husbands, brothers, uncles... [and] if a young women, for example, uses her child support grant for her own or her child's use she is accused of being selfish and irresponsible'; 'specific variables such as gender, generation, marital status and seniority are important factors in understanding household relations and dynamics as these relate to the consumption, production and allocative patterns within households; and 'gender and age largely determine how task are shared and resources allocated within the household.'

state role-players which improperly suppose that customary payments are not helpful to victims and these arrangements are outside of the jurisdiction of the courts despite the gender vulnerabilities that accompany these settlements.

This in turn results in a discriminatory outcome as there is no oversight to ensure that customary compensation payments benefit victims, and this aggravates their vulnerabilities especially so when power imbalances are often evident when these customary financial agreements are negotiated as victims are often persuaded to stop continuing with their criminal complaints when money is provided to male authority figures. Furthermore when there is a lack of proper oversight of customary arrangements, discrimination occurs by way of reinforcing unspoken biases that suggest that the gender vulnerabilities inherent in these customary settlements are simply a private matter under customary law despite the fact that they are often cited as mitigating factors that reduce sentences. This approach is consistent with Joan Williams' suggestion that "women are disadvantaged not merely by a single rule or interpretation but by processes involving many different actors motivated by a variety of stereotypes of which they are barely conscious or blissfully unconscious... [and in these situations] women's disadvantage stems not from a single male norm kept in place by a single institution or actor, but rather from many people (women as well as men) acting in a decentralized way who are driven by (often unconscious) stereotypes."³²⁹

In addition to biases it is also significant to note that statutory impediments exist that can deter prosecutorial and judicial oversight of customary compensation agreements in minimum sentencing matters only.³³⁰ In this regard, the *Criminal Law (Sentencing) Act* limits the discretion of Judges by precluding "an accused person's cultural or religious beliefs about rape" being examined or reviewed in

³²⁹ Joan Williams (2000:216 to 217).

³³⁰ A review of how minimum sentencing laws interface with compensatory provisions in sentencing proceedings is found in subsection 5.1.

minimum sentencing dispositions even where such beliefs are contested in the court record.³³¹ This is a concern for two reasons. Firstly, for offenders, because customary compensation can be a mitigating factor (and therefore reduce the sentence of an offender) if the offence is not subject to minimum sentences.³³² Secondly, for victims of sexual violence, as offenders may not unilaterally offer customary compensation (that can assist victims with their post assault medical, counseling and security costs) if they know it will not be proffered as a substantial and compelling reason in which to deviate from the minimum sentencing regime.

³³¹ *Criminal Law (Sentencing) Act 38 of 2007*, substitution of section 51 of the Criminal Law Amendment Act 105 of 1997, as amended by section 33 of Act 62 of 2000 and section 36 of Act 12 of 2004 to include subsection 51(3)(aA)(ii). Bertelsmann et al. (2012: 12-24 to 12-25) note that "the legislative has introduced a further restriction upon the court's sentencing discretion by decreeing ...[that] an accused person's cultural and religion beliefs about rape...shall not constitute a substantial and compelling reasons circumstance justifying a lesser sentence [than the mandatory minimum]."

This amendment was introduced as result of an unreported Supreme Court of Appeal decision in *S v Mvamvu* (350/2003 dated 29/09/2004) in a case involving the rape of a customary wife. In this case, Mthiyane J, while reviewing the trial court's sentencing decision, looked into the traditional cultural practices that affected the offender's actions and concluded that these influences could not be disregarded without careful consideration, as they affected the offender's understanding of the crime and the values of the community in which he lived. The court stated at 7 that the offender's "actions were shaped and moulded by the norms, beliefs and customary practices by which he lived his life... [and] these ingrained traits and habits of the accused cannot be ignored when considering an appropriate sentence." The National Prosecuting Authority disagreed with this judgment stating in their *Sexual Offences Bulletin*, Number 6, at 11, that "it would appear that the judge *a quo* overlooked the benchmark [in the minimum sentencing legislation] indicating the seriousness with which the legislature views these types of offences and this approach by the court *a quo* amounts to a material misdirection."

³³² Bertelsmann et al. (2012: 12-24 to 12-25) note that:

"in *S v Nkawu* 2009 (2) SA 402 (ECG) Plasket J held that, if these restrictions on the catalogue of mitigating circumstances were to be interpreted literally, the subsection would be rendered unconstitutional as it would require the court to ignore factors relevant to sentence, which result in unjust sentences being imposed. As a court is obliged to interpret a statute as far as possible in such a fashion that it is given a constitutionally compatible meaning, he interpreted the section as meaning that standing alone, such factor could not be taken into consideration but could be included in a list of several aspects militating in favour of a lesser sentence than the prescribed minimum. It is respectfully submitted that if the subsection is indeed unconstitutional (as, with respect Plasket J has convincingly argued) the problem is not resolved in this manner, as it is still possible that the exclusion of the only mitigating factor could result in an unjust sentence."

Regarding the second concern, as highlighted in subsection 5.1, compensation can still be provided to sexual violence victims irrespective of minimum sentencing laws (via composite sentences and deviations on account of substantial and compelling reasons not relating to culture). Still, offenders may not engage with customary compensation agreements if they cannot use these agreements to reduce their mandatory minimum sentences.

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5.5 Conclusions

This Chapter has referenced the statutory and procedural processes in South Africa that allow for compensation to victims of sexual crimes by way of sentencing and forfeiture proceedings, government grants/subsidies, and through customary agreements facilitated and vetted by prosecutors or the judiciary.

With this in mind, it is important to note the following:

- That the sentencing provisions are flexible, and can be used irrespective of minimum sentencing laws, and they can provide for compensation alongside incarceration;
- that the forfeiture provisions can be used to execute real property, without ancillary civil judgments, for the benefit of victims;
- That government grants/subsidies can be provided to assist victims with their dire post assault expenses when offenders do not provide compensation;
- And finally, that customary compensation arrangements can benefit victims of sexual violence by providing them with meaningful post assault compensation while also attending to the cultural demands of the communities in which they reside, so long as court oversight is provided thereto.

The NPA itself has confirmed that victim compensation is an important mandate of the prosecution service in South Africa. More specifically, in the NPA *Quarterly Performance Overview Report of Public Prosecutions – Quarter Two – 2011/12*, the following is noted:

- The NPA monitors 'orders in terms of POCA where a person has suffered damage to or loss of property or injury as a result of an offence or related criminal activity (sec 30 of POCA) or the exclusion of property from a forfeiture order to pay a victim (sec 52 of POCA). It also includes agreements facilitated by the NPA to repay money to a victim and also

includes formal court orders in terms of section 300 and section 297 of the Criminal Procedure Act.³³³

- The purpose of benchmarking victim compensation is to provide ‘an indication of the ability of the NPA to assist victim who have suffered financial loss due to crime.’³³⁴
- The NPA desired performance standard is ‘to increase the target of R50 million [paid to victims] in 2010/11 by 10% per year.’³³⁵

In addition, the NPA’s *Code of Conduct*³³⁶ further stipulates that “prosecutors should...consider the views, legitimate interests and possible concerns of victims and witnesses when their personal interests are, or might be, affected, and endeavor to ensure that victims and witnesses are informed of their rights, especially with reference to the possibility, if any, of victim compensation...”³³⁷

With regards to the NPA facilitation of the SRDG and CWS the above mentioned *Code of Conduct* confirms that “in order to ensure the fairness and effectiveness of the prosecution process, prosecutors should...co-operate with...any relevant government agencies...”³³⁸

³³³ National Prosecuting Authority (2011:19 and 29).

³³⁴ National Prosecuting Authority (2011:19 and 29).

³³⁵ National Prosecuting Authority (2011:19 and 29).

³³⁶ *Code of Conduct for Members of the National Prosecuting Authority Under Section 22(6) of the National Prosecuting Authority Act 32 of 1998* (Government Gazette 33907 on 29 December 2010 from DOJCD). This policy was put into effect 18 October 2010.

The Code also confirms in Part F (Enforcement) that “all prosecutors should respect and comply with the terms of this Code and report any instances of unprofessional conduct by colleagues (and also as the case may be other court officials) ...and in the event of transgressions, appropriate disciplinary steps may be taken in terms of the Public Service Regulations and NPA Act No32 of 1998.” Finally note that in the concluding ‘Notes to Code of Conduct’ it is confirmed that “a copy of this Code should be handed to all prosecutors at the time of their taking the oath or making affirmation as prescribed in section 32(2) of the Act or as soon as possible thereafter, and signed for to denote acceptance thereof.”

³³⁷ *Ibid*, Part D (Role in Administration of Justice), Paragraph 2(c).

³³⁸ *Ibid*, Part E (Co-Operation) paragraph (a).

Finally, the NPA acknowledges the important role it can play in traditional communities. In this regard, NPA programmes such as *Project Ndabezitha* assist with gender violence matters and try to bridge the indigenous system of law with the courts.³³⁹

With the foregoing in mind, the empirical investigations (as outlined in Part 5, chapters 7 and 8) confirmed that although laws are in place to assist victims of sexual violence with their compensatory concerns, as outlined in this Chapter, these laws were persistently overlooked by prosecutors, judges and state-attorneys on account of biases. Bias was suggested as a factor for this omission because interviews and case studies confirmed that state role-players did not assist victims of sexual violence because they incorrectly believed that their financial losses were not quantifiable and/or sexual violence victims generally did not want, or need, compensation. Victim surveys undertaken for this thesis rebutted these unfounded assumptions and confirmed that many sexual violence complainants were able to list quantifiable damages relating to both their court appearances and post-assault care, and that some of these victims would accept compensation from offenders and that modest amounts of compensation would be useful.

The research interviews and case studies confirmed that South African prosecutors and judges rarely addressed discriminatory patriarchal customary compensation arrangements (which were arranged by male representatives of the victim's and offender's family) when these customary arrangements arose in sentencing proceedings. Furthermore research confirmed that criminal justice

³³⁹ UNICEF(2006) confirms the following regarding Project Ndabezitha: firstly '[the overarching goal of the project was to] establish the multi-disciplinary management of domestic violence cases in the rural communities where traditional leaders are based' (2006: 72); secondly '[there was a] need to create a referral system between [traditional leaders] and prosecutors because in rural areas it is often traditional leaders who are the entry-point into the criminal justice system' (2006: 69); and thirdly 'the traditional leaders after passing a judgment... refer the victim or survivor and the perpetrator to a counsellor to facilitate healing or court to obtain retributive justice.' (2006: 75). In addition, the importance of customary forums in urban areas is reviewed in subsection 3.2.2.

officials did not align customary compensation arrangements with CPA provisions that can provide for incarceration, or other criminal sanctions, when offenders either default on payment, or when offenders improperly direct compensation payments to patriarchal figures that negotiate customary settlements rather than paying compensation directly to victims so they may attend to their recoveries. The omissions by prosecutors and judges, when they did not utilize CPA provisions, exacerbated victims vulnerabilities as difficult civil execution methods would have been necessary to enforce customary agreements if offenders reneged on these agreements.

Lastly, the interviews and victim surveys confirmed that prosecutors rarely informed sexual violence victims of available emergency social grants and court administration stipends, when offenders did not provide compensation, despite prosecutors' awareness that many complainant/witnesses had burdensome economic losses that directly related to their gender, such as childcare, pregnancy and security costs.

-CHAPTER SIX-
CUSTOMARY COMPENSATION AND THE SOUTH AFRICAN CRIMINAL
JUSTICE SYSTEM

6 Introduction

In subsection 5.4 important compensatory cultural practices were mentioned, and the author asserted that these practices often result in discriminatory outcomes for female sexual violence victims. This chapter addresses these concerns and provides suggestions on how the criminal justice system should deal with this issue on a practical level.

There are three reasons why customary compensation is an important aspect to examine when reviewing victims' compensatory rights in the criminal justice system in South Africa.

Firstly, as interview research in subsection 7.1.2 confirms, customary compensation arrangements often take place alongside criminal prosecutions and these arrangements can affect reporting/attrition rates (this concern has also been identified in other jurisdictions as well ³⁴⁰).

Secondly, these arrangements can be abused by patriarchal overseers who subsume the compensation monies for their own benefit (as noted in subsection 6.1.4) while prosecutors and judges are willfully blind by ignoring *viva voce* and documentary evidence that indicates customary compensation was arranged by male figure-heads without victim consultation. This can result in compensation being used in mitigation of sentence, thus reducing an offender's sentence, while safeguards are not put in place to ensure that compensation serves victims'

³⁴⁰ Huong (2012:39 and 48), with reference to Vietnam, confirms that "in the case of rape, the notion of family honor is used as a distinctive patriarchal tool to restrain the victim's choice in pressing charges against the rapist...[and to] negotiat[e] a settlement" and "rape [is] sometimes dealt with outside the justice system – which is against the letter of the law."

needs rather than the male gatekeepers who often arrange these customary settlements.

Thirdly customary arrangements can be important to victims as they can obtain meaningful financial assistance from these customary settlements (for example in the case study in subsection 7.2.3, R30 000.00 customary compensation was paid to a victim to assist with post assault expenses and future educational endeavors). With this in mind, courts can attach these customary agreements to CPA sentences such that offenders will be induced to comply with these financial settlements or face penal sanctions.

Unfortunately, research in subsection 7.1.2 confirmed that prosecutors and magistrates often ignore this important phenomenon despite the above three concerns and victims are therefore forced to enter into unfair customary compensation arrangements by abusive male authority figures.

This section argues that such willful blindness on the part of prosecutors and magistrates occurs mostly on account of biases which improperly suppose that customary payments are not helpful to victims and these arrangements are outside of the jurisdiction of the courts despite the gender vulnerabilities that accompany these settlements.

This Chapter will review why it is necessary for customary compensation arrangements to be addressed by the criminal justice system, taking into consideration victim priorities and their constitutional rights thereto.

This chapter also puts forth arguments based on the suggested approach of the former United Nations Special Rapporteur on Violence against Women, *Yakin Erturk*, in her report *Integration of the Human Rights of Women and the Gender Perspective: Violence against Women, The Due Diligence Standard as a Tool for the Elimination of Violence against Women*. More specifically the report

recommends that programmes to assist with 'cultural negotiation' should be implemented.'³⁴¹ This Chapter agrees with this approach as state role-players must engage with cultural norms to ensure the constitutional rights of victims are safe-guarded and to ensure that their interests are protected when customary compensation arrangements occur alongside court proceedings. With this in mind, prosecutors and judges must better understand the cultural influences victims attend to (and navigate) when they balance state and community obligations in the sentencing phase of court proceedings. This is especially so as many of these cultural traditions (including customary compensation) which can be extremely beneficial for victims, can also be improperly distorted within patriarchal customary cultures in South Africa. Cultural negotiation is therefore necessary as state officials have a role in ensuring discriminatory outcomes do not result when male gatekeepers, who claim to represent victims, seek customary damages for their own advantage irrespective of the victims' needs (as was done in Case Study Three in subsection 7.2.3) while negotiating with prosecutors and offenders regarding mitigating factors in which to reduce sentences.

In this regard, S Ndashe confirms the following:

'One of the fundamental flaws in the arguments of proponents of gender equality has been to obscure the overlap between formal law and culture... The recognition of the collusion between multiple legal systems to the detriment of African women is therefore an area where critical engagement is necessary. This process requires an identification of the layers of discriminatory aspects of the customary practices, and statutory and common laws that, individually and combined, serve to subjugate women.'³⁴²

³⁴¹ United Nations, Commission on Human Rights (2006:19 and 20).

³⁴² Ndashe (2005: 84).

6.1 Compensatory criminal processes and cultural practices

Many black South African rape victims would not go to the police without first obtaining the permission of a patriarchal figure in the family who has decision-making authority.³⁴³

In light of the above, it becomes apparent that state criminal processes necessarily interact with other familial dispute forums in South Africa and if the criminal justice system is to assist all victims, irrespective of their geographic, cultural and socio-economic positioning, this reality must be addressed by the criminal justice system.³⁴⁴ In terms of such an approach, role-players, from both civil society and government, should ensure that culturally relevant programmes and policies are in place to assist black South African sexual violence survivors when they navigate between the various adjudicative arenas, including programmes and policies that assist with customary compensation payments.

³⁴³ See subsection 7.1.2 regarding findings from structured interviews with magistrates and prosecutors in various Sexual Offences Courts in Cape Town in 2006. Also note the comments of one of the magistrates interviewed:

'if a child, a young child, complains to the mother [about an alleged sexual assault] then the mother wouldn't go to the police station on her own. In the six years I've been here [as a magistrate in the Sexual Offences Courts in Cape Town] I've seen some change, where parents are, or mothers, are starting to take their children, or where complainants at a very young age would go to the police station on their own, but generally a male of that family has to be contacted to contact the male family of the accused. And then they will decide... as a female you would not go to the family of the accused if there is a male in your house, either the father or grandfather, or brothers, the males would go to the accuser's family and contact the males there and they would discuss the matter, that is what I hear from the witnesses that testify every day.'

Furthermore, Mampela Ramphela confirms that when 'personal problem[s]' occur, in the lives of many black South Africans 'rituals are performed to appease the dead and restore good relationships' and these 'rituals and ceremonies practiced by many [black] South African place ancestors at the centre of their lives.' (Ramphela: (2008: 10)). With Ramphela's comments in mind, after a sexual assault occurs it is common for black South African families to undertake cleansing ceremonies and damage payments to restore good relations.

³⁴⁴ For example Bowman and Kuenyehia (2003: 360) note that 'the customary arrangement [of offenders informally negotiating with, and compensating, the complainants' families via traditional structures], however, avoided the trauma and stigma that accompany public reporting and prosecution of rape cases' which begs the question should 'these remedies... be adopted for use today.'

Furthermore there are four (4) other important and pressing reasons why cultural negotiation via prosecutorial and judicial oversight is urgently required to fully protect victims, when customary compensation arrangements are brought to the attention of state role-players.

Firstly, oversight is required in order to ensure that the negative patriarchal influences are negated (as outlined in subsection 6.1.4).

Secondly, victims of sexual violence, for the most part, are likely to stay or return to their own communities, for financial and non-financial reasons, rather than remove themselves, and their dependents, from their local support structures, homes, schools, employment, languages and cultures.³⁴⁵ Therefore, cultural concerns must be addressed within the criminal justice system as it is necessary to provide mechanisms whereby women can deal with local traditions (some of which are forced upon them) while asserting their rights in the formal criminal justice system. This approach is consistent with what the United Nations Research Institute for Social Development (UNRISD) calls the “pragmatic view” because “these [cultural] systems will not go away” and ‘informal justice tribunals hear a far greater number of cases of gender based violence than do the police and the formal courts.’³⁴⁶

³⁴⁵ Mills (2003: 61) confirms that ‘when most women consider leaving an abusive relationship, they do so after understanding the costs. Emotional attachment, love for their children, race, religion, and ethnicity, as well as economic issues, are just a few of the considerations women in abusive relationships must weigh.’

Also McGillivray and Comaskey (2004: 74) confirm that “factors affecting the decision to leave or seek help include the complex of controls exercised by abusers, societal pressure and women’s cultural training to ‘see things through’ and keep the family together, the affection or love that women may have for their partners, hopes that the abuse that they may see as temporary will end, fear of losing their children, fear of being alone, lack of money and other resources and conflicting personal, family, religious and ethnic loyalties.”

³⁴⁶ UNRISD (2005:15) and (2004: 187).

Thirdly - as elaborated on in the research described in subsections 7.1.2 (interviews with Sexual Offences Court prosecutors and magistrates), 7.2.3 (a court case study) and 8.4 (complainant surveys) – prosecutors, magistrates and the police often informally facilitate customary compensation agreements in order to mediate between the cultural demands of victims and their communities. It is asserted by the author that state role-players informally assist with these cultural compensation agreements as they are aware that complainants may not report crimes, or be cooperative witnesses, if their cultural concerns are not addressed. As J Van Niekerk confirms, ‘...some families, especially those who live in poverty, may be persuaded or motivated to accept damages from the perpetrator and thus seek an alternative 'solution' to the sexual assault on the child’,³⁴⁷ and:

‘... [South African Police Services (SAPS)] members are sometimes reported to participate in negotiating payment of ‘damages’ as an alternative to continuing the investigation. Although, in theory, only a prosecutor can withdraw charges or accept a withdrawal statement, SAPS members are frequently involved in this process.’³⁴⁸

This informal approach to dealing with compensatory arrangements is worrisome as court supervision is necessary: to ensure victims are not coerced into these agreements; to ensure that improper patriarchal influences are looked into; and finally to ensure the settlements are included in criminal sentences so they have the proper penal effect and are properly monitored for compliance by state corrections officials.

Finally the fourth reason why cultural negotiation via prosecutorial and judicial oversight is urgently required to fully protect victims is on account of substantive equality principles, as reviewed in subsection 1.2, which demand that sexual violence victims, who are mostly female, be assisted with cultural barriers that

³⁴⁷ Van Niekerk (2004: 264).

³⁴⁸ Van Niekerk (2004: 265).

hinder their access to justice, their post-assault recoveries and their independent decision making regarding post-assault economic decisions.³⁴⁹

Having confirmed the benefits of an approach based on cultural negotiation via court oversight processes, this chapter will review five (5) important issues, in the forthcoming subsections, that need to be contextualized before addressing how oversight should be specifically provided in relation customary compensation arrangements, as outlined in subsection 6.1.5. The five preliminary issues that need to be canvassed are: South African legal pluralism in relation to the administration of criminal justice; the current application and influence of customary law in South Africa in urban and rural areas; the individual agency of survivors of sexual violence when confronting cultural issues; and, problems with patriarchal structures when compensatory customary practices are employed alongside criminal proceedings.

³⁴⁹ For example Mosoetsa (2011:65) in relation to research conducted in KZN and Mpumalanga, confirms that 'cultural tradition tends to keep women subordinate to their husbands, brothers, uncles... [and] if a young women, for example, uses her child support grant for her own or her child's use she is accused of being selfish and irresponsible'

The above logic could also be applied to male figureheads who subsume customary compensation payments.

6.1.1 Legal pluralism in South African criminal law

TW Bennett notes that 'legal pluralism is, perhaps, less a theory than a way of perceiving customary law.'³⁵⁰ This is so, because customary law systems throughout the world co-exist with state institutions, and other informal adjudication forums, thereby creating pluralistic legal frameworks. For example, South Africa is said to have a pluralistic legal society in two ways: firstly, in its constitutional recognition of customary law alongside Roman Dutch/English Common law, and secondly, with its multiple forums of criminal dispute adjudication, informal and formal, sanctioned and non-sanctioned, that incorporate official customary law, living customary law and historical community practices.³⁵¹

The research in this thesis also confirms the existence of legal pluralism in matters involving sexual violence in South Africa. In this regard, the below sources regularly noted intersections between customary traditions and the formal criminal justice system: interviews with Sexual Offence Court prosecutors and magistrates in subsection 7.1.2; the court case study in 7.2.3; and finally victim survey responses in subsection 8.4.

³⁵⁰ Bennett (2004: 27). Bennett also clarifies that '...customary law derives from social practices [as opposed to exclusively written legal authorities] that the community concerned accepts as obligatory' thereby confirming that it is a normative system of law (2004: 1).

³⁵¹ Van Niekerk (2002: 12 and 15-17) elaborates on the two forms of legal pluralism that exist in South Africa today. In this regard, with emphasis added: 'state-law pluralism' being the 'law which emanates from, and is supported or authorized by, the highest political authority in the county' and which consists of the 'framework of the Roman Dutch/English common law' and the "official indigenous law', that is, indigenous law incorporated into legislation, or pronounced in judicial decisions.' Secondly, 'deep legal pluralism' being the above noted state sanctioned law combined with 'unofficial indigenous law' as administered by 'both official and unofficial institutions' and 'peoples law' as administered by community courts in black townships.

Also note that Nicholson (2012:270 to 271 and 273) states that:

South Africa, as a complex legal tradition must thus reconcile different simple traditions within a single unified complex tradition. This process demands tolerance, in the sense of building real bridges rather than permitting things that might ordinarily have been viewed as unacceptable... Deep pluralism will permit the retention of the distinctiveness of various South African legal cultures and facilitate the embracing of difference. Furthermore, uniqueness and distinctiveness of individuals, communities and their law must be persevered and embraced...deep pluralism accords with the trend towards tolerance of unofficial laws."

6.1.2 Sexual delicts in rural and urban areas

The South African Constitution ³⁵² prescribes in section 211(3) that ‘...courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.’³⁵³ This section confirms the importance of South African customary law, and in addition, it also lends supports for three other imperatives that must be addressed when examining the cultural influences in the administration of criminal justice, in relation to sexual violence matters in South Africa. Firstly, in the spirit of *ubuntu* ³⁵⁴ the prosecution system must attend to community healing in addition to state penal concerns in post-apartheid South Africa. Secondly, constitutional precepts in relation to equality and security of persons must be upheld when customary law is relied upon (these constitutional imperatives are fully explored in Chapter Two). Finally, the criminal justice system must ensure that victims receive customary compensation for sexual delicts, if so desired, as this practice continues to be employed by many black South Africans when sexual violence occurs.³⁵⁵

With regard to this latter issue, the requirement that offenders compensate the family of a sexual violence victim, within customary law, is well documented in the juridical history of black South Africans and this tradition remains an important healing mechanism for individuals and communities. In this regard,

³⁵² Constitution of the Republic of South Africa, 1996.

³⁵³ Ibid subsection 211(3).

³⁵⁴ Labuschagne and Van den Heever (2002: 81) confirm that the *ubuntu* concept of customary law may, where applicable, be used as ‘a guideline to achieve the [constitutional human rights] adaptations and to justify them [in customary patriarchal structures].’

Also note the comments of Amela J from the Western Cape High Court in *S v Matiwane* 2013 (1) SACR 507 at 16, which involved a case of theft, where it is noted that “the magistrate in my view should have been alive to the accused’s socio-economic background and applied the well known principle of ‘ubuntu’ (humanity) in the matter, taking into consideration, inter alia, the accused’s personal circumstances, and the reason for his being unable to pay a fine and his sickly condition at the time of sentencing... [and] in the result... the accused is cautioned and discharged and must be immediately released from prison”

³⁵⁵ See subsections 7.1.2 and 8.4 along with the case study in subsection 7.2.3.

JML Labuschagne and JA Van den Heever confirm that compensatory processes and criminal processes co-exist with each other, on an equal basis, in 'living' customary African law, when they stress that 'it must continuously be borne in mind that there is no clear distinction, as is the case in most Western legal systems, between criminal and private law sanctions and procedures [in indigenous law].'³⁵⁶ The authors furthermore confirm the importance of enjoining customary aspects of sexual wrongdoings, in formal criminal proceedings, when they note that 'a virgin who has been raped may also be a victim of defloration [of an unmarried girl]' and therefore subject to '[customary] delictual liability.'³⁵⁷

AC Myburgh as well confirms that 'rape in its delictual aspect is usually dealt with in [the African customary courts] much the same way as seduction or adultery, as the case may be'³⁵⁸ thereby demonstrating the relevance of compensation in customary law matters involving sexual violence. Myburgh notes that, within customary law proceedings:

'... [the] rights of personality are violated by assault, negligent injury to the body, threats involving... rape, seduction, adultery, courting a married woman, abducting a wife, and kidnapping a girl... Each of the delicts last mentioned may entail satisfaction of the creditors for shock or trouble (that is, for personal injury caused by the violation of patrimonial right) besides mulcting of the debtors in damages, while assault or negligent injury of the body may entail payment of medical expenses (that is, of damage for patrimonial loss caused by the violation of a right of personality) and of an amount to make amends for suffering.'³⁵⁹

A further example of compensation being sanctioned in African customary law, after sexual violence, is described by L Townsend and A Dawes, who note that certain cultural groups in South Africa, such as the Nguni 'practice *inhlawulo* and *ukugeza*, [which] stipulates that where a man impregnates a woman outside of

³⁵⁶ Labuschagne and Van den Heever (2002: 23).

³⁵⁷ Labuschagne and Van den Heever (2002: 83).

³⁵⁸ Myburgh (1985: 25).

³⁵⁹ Myburgh (1985: 19).

wedlock, he is obliged to make payments of either money or livestock to the woman's father or guardian as a token of recognition of responsibility and good faith... [and this] same practice is extended to non-consensual sexual relations between adults and children.³⁶⁰

Research further suggests that customary sexual delicts play an important compensatory role in urban environments, in addition to rural settings, although these delictual customary practices are adapted to the economic and social exigencies of urban township life. Interview findings in subsection 7.1.2 clearly demonstrated this and DS Koyana and JC Bekker also confirm that informal urban forums are known to 'apply a mixture of indigenous customary, common and self-made law.'³⁶¹

With regard to 'community courts' W Schärf confirms that these informal structures 'take on everything except rape and murder, although many have been known to do so if they didn't trust the police to deal with the matters,³⁶² and that they execute the following penalties: 'restitution, service to the aggrieved party, compensation for lost work-time and hospital expenses, or service to the community.'³⁶³ Also Koyana and Bekker similarly conclude that community courts deal with sexual violence, as '... a young man who raped or seduced a girl may, for instance, be ordered to be whipped and to pay compensation to the girl's father.'³⁶⁴

The above literature review confirms that the customary law practice of compensating victims for sexual delicts is prevalent in South Africa, in rural and urban environments. Furthermore – as will be elaborated on in subsections 7.1.2, 7.2.3 and 8.4, criminal justice role-players often informally facilitate customary

³⁶⁰ Townsend and Dawes (2004: 66).

³⁶¹ Koyana and Bekker (2006: 142).

³⁶² Schärf (2001:49).

³⁶³ Schärf (2001:50).

³⁶⁴ Koyana (2005: 30).

compensation payments, in both rural and urban environments, so as to mediate cultural demands faced by victims when they seek to both testify as witnesses/complainants (perhaps in relation to mitigation of sentence to request non-incarcerate sentences for offenders who have paid customary compensation) and when they seek to take part in community based post assault ceremonies, rituals and traditions (which may include payment of customary compensation).

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6.1.3 Women's and children's agency

'Agency' can be described as the rational will of individuals³⁶⁵ in combination with the rational decision making capacity of individuals.³⁶⁶ South African women employ their agency by addressing and confronting a variety of concerns after a sexual assault. They do this as agents of their own autonomy. Familial considerations, financial issues and safety concerns are all weighted and decided upon, post assault. In this regard, the following questions are reflected upon: Should one report the crime? Does one need to take safety precautions and perhaps move residences? Will dependents be affected if the complainant's or the alleged offender's employment is interrupted or if they cannot child rear due to interruptions caused by the reporting?

Culturally, women also have to make decisions. To begin, as rational people, they will be fully aware of the patriarchal nature of their society³⁶⁷ and they will thus have to decide whether to go outside of their culture and involve the police and courts, or alternatively deal with the matters informally within familial, customary or community forums.

³⁶⁵ Kapur suggests 'women's agency is found in their resistance to violence through rights claims' and 'is articulated as part of the will of the victim subject.' (2005a: 112-113).

³⁶⁶ Bennett (2004: 33) suggests that 'modern gender studies are careful to avoid stereotyping African women as poor and powerless and Western women as affluent and educated. In particular, they avoid treating women as the helpless victims of circumstances. Rather, women are considered rational humans, who are fully capable of changing their situations and challenging existing gender biases.'

³⁶⁷ In report published by the Medical Research Council (Jewkes, et al. 1999: 8) it is confirmed that:

'there was considerable disagreement amongst the women interviewed about what Xhosa culture was and, for example, what meanings were attached to *lobolo*. This is important for interventions as it creates space for popular discussion about 'culture' and re-examination of what culture is and means. The fact that so many women indicate that they hold views which differ from their perceptions of the 'norm' in their culture is a sign that a process of questioning and re-examination is underway among women at a community level.'

Also see South Africa. Commission on Gender Equality (2005: 25) where it is noted that '[women] participants felt that cultural and religious beliefs often placed women in subordinate positions *vis a vis* men.'

In addition, women and child victims of sexual violence must also decide if they want to use culture as a tool or strategy within legal proceedings, if they decide to report their abuse to state authorities. E Curran and E Bonthuys confirm that this is common in Southern Africa, as women use customary law 'pragmatically,' 'strategically' and 'interchangeably' with "western' arguments' in legal proceedings involving domestic violence or child custody.³⁶⁸ Furthermore, culture is employed in a calculated, rational manner in formal criminal proceedings by women: when women choose to provide statements and testimony in their indigenous language and when women initiate, abandon or delay the formal criminal prosecution for purposes of informal customary compensation negotiations.

As the above scenarios demonstrate, women sexual assault survivors are not cultural robots,³⁶⁹ but rather they are rational human beings with a self-directing will who use and also deflect culture. External cultural influences are therefore often negotiated as opposed to surrendered to. Of course, as Ndashe notes, 'the emphasis on choice is sometimes a double-edged sword as it recognizes women as agents of their own change but often fails to take into account the quality of choices made, given the constraints that women face.'³⁷⁰ Regardless, on a cultural level, urban isiXhosa speaking women, individually and rationally, make their own choices to stay within their culture, for strategic, safety or familial

³⁶⁸ Curran and Bonthuys (2005: 614-615).

³⁶⁹ Shope also confirms that 'black rural women... are not cultural dopes [and] they are aware of how some men appropriate and manipulate custom to suit their interests' (2006: 70). Furthermore, and in light of the limited recognition of women's agency in the developing world, Kapur confirms that:

'it is necessary to explode the mystery often set up by cultural arguments that obscures the real issues concerning women's human rights. There is a need for economic, social and institutional analysis in order to make certain kinds of politics and strategies feasible in various national settings. Researchers, scholars and women's rights activists must take responsibility for understanding and informing themselves about the complexity of debates that surround issues of women's rights in the postcolonial world.' (Kapur, 2005a: 112).

³⁷⁰ Ndashe (2005: 81).

reasons, or to alternatively, seek state assistance. This type of agency should therefore not be confused with subservience or willful blindness.

With regards to children's agency, M Guma and N Henda assert that 'in addressing the question of whether children are in a position to enforce their legal rights without threatening the stability of their cultural system, the answer is yes at a State or public level.'³⁷¹ Furthermore, the State can act as the conduit for agency, by delaying the decision making authority of children until they reach the age of majority, by acting as a substitute agent, or by acting as a gatekeeper of third party access to the decision making process. An example includes the Guardians Fund, where compensatory awards in criminal proceedings involving children are deposited until the minor reaches the age of majority.³⁷²

Finally, it must be noted that children and women who are meant to be obedient and respectful to male elders in African culture continue to display their own agency and rational will by reporting sexual abuse and assisting the National Prosecuting Authority in prosecutions.

³⁷¹ Guma and Henda (2004: 106).

³⁷² See Nendauni (2008: 15 and 16), where the following is confirmed: the 'Guardians Fund was established in terms of the Administration of Estates Act of 1965'; 'the purpose of the Fund is to protect the monies of various persons who are incapable of doing that for themselves'; and 'if a master is satisfied he/she may pay all the accumulated interest as well as up to the value of R100,000.00 to the natural guardian on behalf of the minor for maintenance, education, medical fees and for any other identified needs.' Also, note the case of *S v Salzwedel and Others* 2000 (1) SA 786 (SCA) wherein the Supreme Court of Appeal ordered compensation to be paid into the Guardians Fund for minor children of a deceased victim, by way of conditions attached to a partly suspended sentence, after a racially motivated murder.

6.1.4 Patriarchy

There is no question that patriarchy, in its indigenous form, developed in part to protect and serve women and children in South Africa.³⁷³ Even today, Townsend and Dawes astutely note that:

‘...whereas it seems that patriarchy conveys male rights over children (and women), with potential for abuse of these rights, it also conveys a responsibility for protection of women and children. By all accounts, given that the great majority of men do not abuse their female partners or their children, it is the latter mechanism of patriarchy that may well predominate.’³⁷⁴

Regardless, male alleged offenders, and male offenders, often use patriarchal customs and cultural essentialisms to undermine and control women. In this regard, the underlying customary law rationale of sexual delicts can, to varying degrees, be distorted and abused, and improperly combined with other cultural practices, to justify criminal behavior.³⁷⁵

Therefore, when offender or state compensation is considered for victims of sexual violence, in patriarchal African communities the following three issues must be canvassed by prosecutorial and judicial role-players.

³⁷³ See Van Niekerk (2002: 13) where a historical review of customary patriarchal influences is undertaken and where both positive and negative qualities of customary influences are noted.

³⁷⁴ Townsend and Dawes (2004:66).

³⁷⁵ Note the following four newspaper articles. O Molatlhwa ‘Girl Forced to marry at 13’ *Sowetan* (3 September 2010) at 2 where it was confirmed by a police spokesperson that ‘the police have opened a case of statutory rape against the man for marrying a minor’ and ‘last night, the man [accused of the statutory rape] confirmed that the girl was his wife.’ ; C Mdletshe ‘Parents Grab Cash in Child Sex Scandal’ *Sowetan* (3 August 2006) at 6 concerning a ‘17-year old grade 11 pupil’ who was allegedly ‘kidnapped by a man who tried to rape her and then paid lobolo to her parents the next day.’ More specifically, following the accusation of attempted rape the man ‘sent a group of people to pay *lobolo* to her parents [and] when they arrived [her] parents asked them to pay a penalty of R2 000 which they did [following which] the girl was then asked if she would marry the man but she refused [and therefore] another R5 000 was paid [upon a forced marriage].’ Also see D Busani ‘Rape or True Love?’ *Sowetan* (12 January 2006) at 5 concerning ‘a 40-year old man who paid ilobolo to the parents of a 14-year old.’ In the article Captain Thandi Mzobe of the KwaZulu-Natal police’s Child Protection Unit states that ‘it would be difficult for authorities to secure a conviction for statutory rape if the girl and her parents had no objection to the 14-year old’s relationship with the 40-year old man.’

First, who will the compensation be paid to upon an informal agreement or court ordered payment (for example will a male authority figure insist that the payment be directed to him as is the customary practice)?

Second, who will decide how the compensation is spent (for example will a male authority figure decide how the compensation is used or will the victim be allowed to decide if the money should be used to obtain services for the victim's recovery or to address the needs of the entire family unit); ³⁷⁶

Third, will the *lobolo* have to be returned to the husband's family if an allegation of sexual misconduct takes place as this will 'diminish her bride price'? Also would these scenarios result in victim ill-treatment by the woman's own family due to the financial hardship. ³⁷⁷

If the above issues are not addressed by the criminal justice system women and children may be left in a cultural vacuum and therefore at risk that their constitutional rights to equality, non-discrimination and security of the person, will be violated. With this in mind the following subsection will review options the

³⁷⁶ Bowman and Kuenyehia (2003: 360) where this concern is raised, when it is noted that when traditional remedies for rape are employed, 'involving compensation to the girls family... should the family be required to spend the compensation money upon the victim's rehabilitation and education?'

Also note Mosoetsa (2011) in relation to research conducted in KZN and Mpumalanga, confirms at 65, 132 and 133 respectively, that 'cultural tradition tends to keep women subordinate to their husbands, brothers, uncles... [and] if a young women, for example, uses her child support grant for her own or her child's use she is accused of being selfish and irresponsible' ; 'specific variables such as gender, generation, marital status and seniority are important factors in understanding household relations and dynamics as these relate to the consumption, production and allocative patterns within households; and 'gender and age largely determine how task are shared and resources allocated within the household.'

³⁷⁷ Mbatha, Moosa and Bonthuys (2007: 175) wherein the authors confirm that 'the fear of having to return the lobolo to her husband could contribute to a women's family discouraging her from leaving an unsatisfactory and possibly violent marriage.'

Also note Huong (2012:48) where it is noted that "in patriarchal societies, the chastity of a women is not only emblematic of her dignity and morality, but also reflects the good name of her family, clan, kin group or class [and] this is what is affected when women and girls are raped or otherwise abused."

state can implement to modify these problematic cultural gender imbalances within the criminal justice system.

6.2 Accommodating cultural concerns in the criminal justice system

This thesis asserts that the criminal justice system needs to be culturally accessible to sexual violence victims if they are to report crime and cooperate with law enforcement officials.

Therefore the criminal justice system must ensure community expectations and cultural obligations are not overlooked as this will force women and children to make uncomfortable compromises, on account of competing cultural obligations or demands, when reporting their abuse and cooperating with the criminal justice system. It is therefore suggested that court oversight should be required when state officials become aware of cultural agreements between victims and offenders during the criminal trial or the sentencing proceeding. When implementing such an approach two (2) practices that are culturally sensitive may be helpful. Firstly, by ensuring complainant and community compensatory expectations are reviewed at sentencing proceedings; and secondly, by way of social grant programming, so women have alternative community compensatory sources, other than cultural financial arrangements (which often result in discriminatory outcomes for sexual violence survivors).

Regarding the first proposition, it is recommended that the state should actively integrate customary compensatory practices within formal court processes. With this in mind, prosecutors and the judiciary should ensure customary compensation traditions are reviewed and vetted in sentencing proceedings to ensure that these practices benefit vulnerable victims as was partly done in the case study in subsection 7.2.3. Moreover, customary compensation agreements should be specifically addressed in suspended sentences and correctional supervision orders as was done in a murder case in *S v Maluleke* 2008 (1) SACR 49 (T).³⁷⁸

³⁷⁸ Note Terblanche's comments (2007: 176-177) regarding the reported case of *S v Maluleke* 2008 (1) SACR 49 (T) as it relates to the suitability of court oversight of customary compensation arrangements. The case involved the murder of a home intruder and Terblanche sums up the

Also pre-sentence reports should address legitimate and illegitimate customary demands so that prosecutors and the judiciary can properly review and oversee cultural agreements. In this regard, Department of Correctional Services' officials can address the cultural demands of victims and offenders by ensuring that CSRs include a review of customary practices while prosecutors can ensure that VIRs address the payment of customary damages and other cultural concerns.

The second method that can be employed to encourage alignment of customary practices and the formal criminal law is the provision of social grants. This social grant provision could address costs associated with cultural rituals and customs such that victims are not dependent on patriarchal figures when arranging finances for cleansing ceremonies, *lobolo* refunds and sexual delicts. In this regard, victims will likely return to their communities post assault and cultural obligations will remain. With this in mind, compensation from social grants could enable victims to independently address the numerous cultural demands before them, as outlined in subsection 6.1.4, while cooperating with the criminal justice system.

In addition to strengthening victims' 'cultural agency', as noted above, the provision of social grants would also be beneficial as it would reinforce notions of community redress and *ubuntu*. This is so as individual survivors could return to their communities with government support in hand thus demonstrating that the current system of criminal justice will serve both indigenous values and criminal justice imperatives. In this regard, African legal scholars have noted the need for the criminal justice system to accommodate customary obligations. DD Ndima, when recounting his previous time on the Transkei bench, confirmed that the

sentencing order as follows: 'at stake in this case was a traditional custom in terms of which she should send an elder member of her family to that of the deceased, as a token of an apology and a way to mend the relationship between the families... [upon which she would be sentenced to] eight months' imprisonment, suspended on condition that *inter alia* that she follow this custom.' Furthermore, Cowling (2008: 338) confirms that the affected 'community considered itself to be largely governed by African customary law... [and] overtures between the accused's and deceased's families had been made in accordance with customary traditions [so that the suspended sentence was in order].'

'harmonization of crime-fighting methods [by combining state sanctions with customary redress] promoted the legitimacy of the courts as the people started to realize that the courts could also be used to enforce their traditional obligations.'³⁷⁹

The approach put forth in thesis, in relation to social grant provision, is also consistent with J Mercier's suggestions in 'Eliminating child marriage in India: a backdoor approach to alleviating human rights violations'³⁸⁰ wherein she proposes using tax reform as a tool in which to negotiate with cultural practices on issues of violence and women surrounding child marriage and dowry-related violence. In this regard Mercier confirms that: '[although] India's Child Marriage Restraint Act (CMRA) prescribes the minimum age of marriage as eighteen years for girls and twenty-one years for boys.... and despite having, by statute, one of the highest minimum age requirements for legal marriage, child marriage continues to be widespread throughout India.'³⁸¹ In addition, she notes that: 'the Dowry Prohibition Act of 1961 makes it a crime to give, take, or demand dowry, punishable by prison terms and substantial fines [but] because both the givers and takers of dowry are held guilty of the offence, the act works as a disincentive for the bride or her family to report dowry cases'.³⁸²

In light of the foregoing Mercier posits that:

'... it becomes apparent that the practice of child marriage is deeply ingrained in Indian culture and tradition. Thus, relying on the government and certain professionals [such as health professionals, law enforcement officials, people's representatives, members of the judiciary, social workers and the local community] to eliminate the practice through an imposed rule, which seeks to change superficially the culture's patriarchal perceptions of women, will likely face wide-spread and long term opposition.'³⁸³

³⁷⁹ Ndima (2004: 22).

³⁸⁰ Mercier (2006).

³⁸¹ Mercier (2006:378).

³⁸² Mercier (2006:390).

³⁸³ Mercier (2006:380).

Mercier therefore suggests that:

‘the national government, through tax incentives involving the registration of marriages and the property and inheritance laws, should create financial incentives for the people of India to change their habits and behaviour. If all parties to a marriage, including the bride’s parents, will enjoy a tax benefit and property protection from registering marriage and dowry gifts, then the parties to a marriage will be more inclined to wait and marry at the legal, financially beneficial marrying age. Pragmatic, economically induced behavioural changes should be made in such a way as to compliment the human rights and feminist approach...’³⁸⁴

Mercier’s suggestions are similar to the approach taken throughout this subsection. Mercier proposes that state financial or monetary tools can play an important and lasting role in combating gender based violence. Put simply, Mercier believes in cultural negotiation by way of monetary benefits and the author agrees with this proposition. For example, in India child marriage is facilitated by dowry payments while in South Africa it can be said that customary compensation payments facilitate the non-reporting of crime. This is so because when customary sexual delicts are arranged between families of the victim and the offender victims/witnesses are often persuaded to not report their abuse or to be uncooperative witnesses (as confirmed in interviews in subsection 7.1.2 and survey results in subsection 8.4).

With Mercier’s suggestions in mind, it is suggested that cultural financial arrangements should be reviewed by emergency social grant structures such as SASSA taking into consideration the gendered vulnerabilities of women when confronted with post-assault cultural demands. This would be beneficial in the short term and long term. In the short term because sexual violence victims would retain their agency when customary agreements are negotiated alongside court proceedings as they could attend to compensatory cultural demands via state or community structures without being coerced into either alternative. Also

³⁸⁴ Mercier (2006:396).

this would be beneficial in the long run as customary agreements would slowly over time no longer be incompatible with the reporting of crime.

6.3 Conclusions

It was suggested in this Chapter that the criminal justice system must ensure that victims of sexual violence are not discriminated against when customary compensation arrangements take place alongside prosecutorial processes. This is especially so as court oversight is currently provided to violent crime victims in general when customary agreements take place alongside prosecutorial processes, as noted in the case of *S v Maluleke* 2008 (1) SACR 49 (T).

With the above in mind, the willful blindness of state officials results in unfair gender discrimination as female sexual violence survivors are often forced into male driven compensatory mediation processes, post assault, without informed consent, and the state abdicates itself from the matter on account of wrongly assumed jurisdictional issues and misplaced concerns about relevance.

This Chapter suggested that state oversight is needed to ensure patriarchal abuse of customary traditions does not occur (as outlined in subsection 6.1.4) and to ensure customary compensation agreements are incorporated into CPA sentencing orders that have penal sanctions should there be defaults in payments. Furthermore, two further oversight practices were canvassed in this Chapter and it was asserted that these practices can ensure that the gendered vulnerabilities of sexual violence victims, in relation to customary obligations, are fully addressed by the criminal justice system. More specifically it was suggested that pre-sentence reports, such as CSRs and VIRs, should thoroughly canvass customary compensation agreements that take place alongside sentencing dispositions (especially so when these agreements are often relied upon as mitigating factors to reduce offender sentences), and that prosecutorial assistance/oversight in relation to social grant provision should be provided so victims can rely on the SRDG government benefit instead of offender sources, if they so wish, to attend to community customary expectations in relation to payments of cleansing rituals and customary damages for sexual delicts.

The author asserts that currently, the criminal justice system is willfully blind when customary compensation practices are manipulated by negative patriarchal influences, in full view of prosecutors, magistrates and correctional officials, and this practice results in discriminatory outcomes. Unfair discrimination is cited as the above noted neglect occurs mainly on account of irrational biases (that are proven in subsection 7.1.2 via interviews with prosecutors and magistrates) which in turn results in an aggravation of women's vulnerabilities. More specifically, prosecutors and judges "indirectly" worsened the vulnerabilities of victims of sexual violence, who are mostly females, when they do not properly review customary compensation as they neglect victims' substantive equality rights in contravention of section 9(2) and (3) of the Constitution (which requires the state to "promote" equality and to desist from "unfairly discriminat[ing]").³⁸⁵ This constitutional breach occurs indirectly as state role-players, applying gender neutral laws and policies, disadvantage female sexual violence victims by way of inaction and omissions mainly on account of the gender biases (which wrongly suggested female sexual violence victims do not have quantifiable losses, that they do not want or need customary compensation, and that despite the gender vulnerabilities inherent in customary traditions these matters are assumed to be outside the jurisdiction of the court even though they drastically effect attrition rates and/or are commonly referred to as mitigating factors by offenders).

More specifically, the research outlined in subsections 7.1.2 , 7.2.3 and 8.4 demonstrates that these biases worsened the existing vulnerabilities of women when they confronted the criminal justice system, and when they sought out post assault health services. This was so as customary compensation was often overlooked or was not aligned to court oversight processes (such as suspended sentences and correctional supervision orders) to ensure payments directly benefited victims on account of gender biases. In this regard, victims of sexual

³⁸⁵ Constitution, subsections 9(2) and (3).

Also note the discussions on substantive equality in subsection 1.2 of this thesis and footnote 174.

violence, who are mostly women, face unique financial obstacles in pursuing post-assault justice and health care and this thesis asserts that the lack of attention afforded to customary compensation was discriminatory. Again, this was so for two reasons. Firstly, because customary compensation can be abused by male gatekeepers when they subsume payments and court oversight is therefore necessary to protect the constitutional rights of victims. Second compensation could have meaningfully helped women victims and in this regard victim surveys in Chapter 8 confirmed that many victims did not avail themselves of free government psycho-medical services, nor did they fully engage the criminal justice system, on account of gendered economic barriers, such as concerns over child care costs or transportation expenses, that were clearly discriminatory in nature and effect.

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-PART FIVE-

**PRACTICE IN THE COURTS COMPARED TO
THE PREFERENCES OF VICTIMS**

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-CHAPTER SEVEN-

THE APPLICATION AND FREQUENCY OF COMPENSATION PROCESSES AS ASCERTAINED BY INTERVIEWS AND COURT CASE STUDIES

7 Introduction

This chapter examines the utilization of compensation provisions, within criminal sentencing and civil forfeiture proceedings, at the Regional and High Courts of Cape Town, as it relates to sexual violence cases and non-sexual violence cases. This review was undertaken in order to discern discriminatory patterns and to ascertain role-player biases.

Two original research data sets were obtained in relation to the above noted concerns:

- First, twenty seven (27) interviews with criminal justice role-players were conducted throughout 2006 and then analyzed;
- Second, eight (8) court file case studies were undertaken, all of which had a compensatory focus.

These data sources confirmed that although laws are in place to assist victims of sexual violence with their compensatory concerns, in criminal and quasi-criminal proceedings, these laws were persistently overlooked by prosecutors, judges and state-attorneys on account of biases. Bias was suggested as a leading factor for this omission because interviews and case studies confirmed that state role-players did not assist victims of sexual violence as they incorrectly believed that their financial losses were not quantifiable and/or sexual violence victims generally did not want, or need, compensation.

Furthermore, this conduct of state attorneys, prosecutors and judges, when they overlooked the compensatory concerns of victims, was also deemed discriminatory for two reasons.

First, discrimination was evident as research in this Chapter confirmed that state officials ignored the unique concerns of victims of sexual violence by not ensuring positive measures were implemented to address gendered barriers to post assault compensation. In doing so they unnecessarily heightened the disadvantages that sexual violence victims' face, post-assault, because compensation, if awarded, could have assisted these victims with their unique gendered financial losses in relation to court attendances, post assault medical care and security/relocation expenses.

Secondly, discrimination was evident as research in this Chapter confirmed that other 'classes' of victims in South Africa were regularly provided with proper compensatory assistance (namely commercial crime victims and violent crime victims in general) in contrast to sexual violence victims who are predominately female. Again this differentiation (and favouritism) occurred partly on account of the gender biases held by state officials who assumed that the specific expenses of sexual violence victims were superfluous and vague, as compared to the expenses incurred by other classes of victims. Also, in doing so they again unnecessarily heightened the disadvantages that sexual violence victims' face, post-assault, because compensation, if awarded, could have assisted these victims with their unique gendered financial losses in relation to court attendances, post assault medical care and security/relocation expenses.

7.1 Interviews in Cape Town in 2006

Although methodological issues were reviewed in subsection 1.4 this introductory subsection will provide more detail on these and other matters. To begin, the author's main objective in conducting interviews was to better understand the functioning of the criminal justice system, in relation to compensatory processes, in the absence of adequate statistics. In this regard, government statistics do not adequately disaggregate compensation information by crime making it impossible to accurately assess the rate of compensation in sexual offences matters by way of government reports.³⁸⁶

Furthermore, there are a myriad of formal and informal compensation processes, as revealed in the case studies in subsection 7.2, making it difficult for the judiciary, court administrators and prosecutors to disaggregate compensation sources, methods and beneficiaries in their statistical information. To address this gap, interviews with criminal justice role-players were conducted to ascertain the general frequency and employment of statutory compensation provisions, and customary payments, that were facilitated by court role-players, in the Regional and High Courts of Cape Town.

³⁸⁶ Email Correspondence with Marelize M Potgieter of the National Prosecuting Service attaching the *NPA Service delivery performance indicators – 2008/09 and 2009/10* (29 Nov 2009) which confirms that nationally in 2008/09, there were 1372 compensation applications and 1039 orders, while in 2009/10 there were 1152 compensation applications and 1039 orders.

Also note Police statistics which were provided for a limited time, in a few previous annual reports confirmed the following:

(i) In the South African Police Service's *2002-2003 Annual Report*, at 62, Table 22, it was confirmed that in 2001 there were **2 490 convictions** relating to family violence and sexual offences and **R18 000** was paid in compensation to one or more of these victims;

(ii) In the South African Police Service's *2002-2003 Annual Report*, at 62, Table 22, it was confirmed that in 2002 there were **2 143 convictions** relating to family violence and sexual offences and **R5 550** was paid in compensation to one or more of these victims;

(iii) In the South African Police Services' *2003-2004 Annual Report* at 41, Table 20, it was confirmed that in 2003 there were **3 031 convictions** relating to family violence and sexual offences and **R9 400** was paid in compensation to one or more of these victims.

First it is important to note that **structured interviews** were completed in addition to **unstructured interviews**. With this in mind, structured interviews employ standard and uniform questions so that decision making patterns can be discerned. Conversely unstructured interviews do not entail the use of uniform questions and therefore the information obtained is less likely to discern decision making patterns although it can still elicit other important factual information.

With regard to the **structured interviews** these took place with Sexual Offence Court prosecutors and magistrates, in their court offices throughout Cape Town, in May and June 2006 (see Appendix 1 for the interview schedule and structured interview questionnaire).

Furthermore, access for interviews with prosecutors from the Regional Court Sexual Offences Courts was facilitated by way of an instruction letter addressed to all sexual offences prosecutors in Cape Town, dated 10 April 2006, from Advocate Bronwyn Pithey from the National Prosecuting Authority's Sexual Offences and Community Affairs Unit, Western Cape Head Office, which stipulated the following:

'Mr. Greenbaum is interviewing prosecutors in Sexual Offences Courts, focusing on compensation issues for victims. He is interested in gathering information of whether compensation (formal and/or informal) was an issue in the resolution of the matter, and whether you as a prosecutor were privy to or involved in any compensation related issues. Please, at your convenience, make yourself available to Mr. Greenbaum, for the interview, as the results of this research will be of great interest and use to the NPA.'³⁸⁷

In terms of the structured interviews with Sexual Offence Court magistrates, on 16 February 2006 the author obtained the verbal approval of Robert Henney, a senior magistrate at the Wynberg Regional Court, and acting Western Cape

³⁸⁷ Correspondence from Advocate Bronwyn Pithey from the National Prosecuting Authority's, Sexual Offences and Community Affairs Unit, Western Cape Head Office, to Bryant Greenbaum (10 April 2006).

Provincial Regional Court President, in his court chambers, to interview magistrates throughout Cape Town.

With regards to the **unstructured interviews** it is important to note that interviews took place in empty court rooms, court administration offices or hallways, a judge's chambers and in a community member's home. Individuals who took part in the unstructured interviews were: a High Court judge, state advocates appearing at High Court, Commercial Crime Court prosecutors, corrections officials, various prosecutors and defence lawyers, and informal community role-players. The author independently approached these entities and thereafter made interview or documentation requests which were agreed to.

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7.1.1 Findings from interviews - use of statutory compensation provisions

This subsection will first review findings from the **structured interviews** with magistrates and prosecutors from various Sexual Offences Courts in Cape Town. Thereafter a review of the **unstructured interviews** findings will take place in relation to the following: a High Court judge, state attorney and two Commercial Crime Court prosecutors from the Cape Town Regional Court.

To begin, **structured interviews** with nine (9) magistrates from Sexual Offences Courts in Cape Town (which sit at the Regional Court level) were undertaken throughout 2006 (see Appendix 1 for the interview schedule and structured interview questionnaire).

Throughout their careers the nine (9) magistrates estimated that they had adjudicated approximately one thousand, one hundred and seventy two (1172) sexual offence sentencing proceedings and on only fourteen (14) occasions did the issue of compensation arise.

In these matters, the court ordered compensation to the complainant on five (5) occasions, in relation to future quantified counselling/therapy/medical expenses.

The reasons cited by the magistrates, for the lack of use of CPA compensation provisions (as outlined in Chapter 5.1), were as follows:

- Six (6) of the nine (9) magistrates stated that offenders were indigent and therefore unable to pay compensation;
- Five (5) of the nine (9) magistrates stated that sexual violence quantification is not possible or difficult in criminal sentencing proceedings (including concerns with estimating future expenses);

- Four (4) of the nine (9) magistrates stated that offenders who are sent to prison are unable to pay compensation;
- Four (4) of the nine (9) magistrates stated that processes are not in place to facilitate compensation reviews i.e. no VIRs, no prosecution compensation requests, and time and resource restraints;
- Four (4) of the nine (9) magistrates stated that complainants do not want compensation from offenders;
- Three (3) of the nine (9) magistrates stated that sexual violence cases must conclude by way of a guilty plea in order for them to award compensation as offenders must accept wrongdoing if they are going to pay compensation;
- Two (2) of the nine (9) magistrates stated that complainants would bring false charges to obtain compensation.

With regard to **structured interviews** with prosecutors who worked at the Sexual Offences Court in Cape Town, the author arranged interviews with ten (10) prosecutors who agreed to take part in the research.

These ten (10) prosecutors had previously been involved in approximately seven hundred and forty two (742) sexual offence sentencing proceedings.

They noted that only on nine (9) occasions did the issue of compensation arise.

The reasons cited by the prosecutors, for lack their lack of employment of statutory compensation provisions, were as follows:

- Seven (7) of the ten (10) prosecutors stated that sexual violence quantification is not possible or difficult in criminal sentencing proceedings (including concerns with estimating future expenses);

- Four (4) of the ten (10) prosecutors stated that offenders are indigent and therefore unable to pay compensation;
- Four (4) of the ten (10) prosecutors stated that complainants do not want compensation from offenders;
- Three (3) of the ten (10) prosecutors stated that processes are not in place to facilitate compensation reviews i.e. no VIRs, no prosecution compensation requests, and time and resource restraints;
- Two (2) of the ten (10) prosecutors stated that offenders who are sent to prison are unable to pay compensation;
- One (1) of the ten (10) prosecutors stated that complainants would bring false charges to obtain compensation;
- One (1) of the ten (10) prosecutors stated that sexual violence cases usually involve long periods of incarceration so that compensation provisions attached to suspended sentence and correctional supervision orders are not appropriate;
- None (0) of the ten (10) prosecutors stated that cases must conclude by way of a guilty plea in order for them to award compensation as offenders must accept wrongdoing if they are going to pay compensation;

As described below, many of the concerns noted by the magistrates and the prosecutors are based upon incorrect assumptions and biases.

First, research indicates that many sexual offenders are steadily employed before being convicted and therefore they often have money and/or assets to satisfy compensation orders even if they are incarcerated forthwith (see

subsection 5.1 for the use of composite sentences which provide for imprisonment and correctional supervision compensation orders).³⁸⁸

Second, compensation preferences of victims of sexual violence at sentencing proceedings have not been comprehensively researched in South Africa and it is suggested that the victim preferences as noted in the victim survey completed for this thesis are therefore relevant. In this regard, out of the forty seven (47) victims who completed the survey, nineteen (19) indicated a preference for compensation, while five (5) were ambivalent. Therefore, the existence of 'taboo trade-offs' as mentioned by A Pemberton needs to be questioned. The survey data suggests that Pemberton may be incorrect when he suggests that 'offering material compensation for the damages incurred due to severe violent crime [including sexual crime], encounters the specific problem of a 'taboo trade-off', which highlights the dilemma of assigning a monetary value to the victim's experience and loss.'³⁸⁹

Third, in the victim surveys completed for this thesis, complainants easily identified numerous quantifiable losses that came about due to their victimization including the following types of ascertainable losses: transportation, medical,

³⁸⁸ Rasool et al (2002: 56) cite the following statistics, gathered for their comprehensive nationwide South African survey, as it relates to sexual violence against women 18 years of age and over: 60% of the sexual abusers studied were working while 8% were working most of the time; 66% had monthly earned incomes of 1000 Rand or more; 30% had monthly income of 4000 Rand or more; and only 14% had no monthly income.

Andersson et al (2000: 20) note in their survey of 2059 men aged between 13 and 83 years, that 'there was no significant difference in the responses between employed and unemployed men as to whether they had sex with a woman without her consent.'

Kistner, Fox and Parker (2004: 21) note the prevalence of perpetrators that are employed teachers. The authors state that 'a study conducted by the South African Medical Research Council in 2002 found that...in most of the cases [of child rape], the offenders were found to be teachers (about 33%)', and at 22-23 it is noted that, educators have 'comparatively high incomes.'

Townsend and Dawes (2004: 69) reveal that 'child abusers come from a variety of backgrounds. This is true for South Africa as well as elsewhere... [researchers have noted] that their experience at Resources Aimed at the Prevention of Child Abuse and Neglect (RAPCAN) proves that rape and child sexual abuse happen amongst all class groups, all racial categories, regardless of affluence, religion, poverty or any other broad societal category.'

³⁸⁹ Pemberton (2009: 5).

telephone, property damage/loss/replacement, emergency housing, security, lost income, lost school fees, counseling and childcare.

Fourth, as reviewed in subsection 5.1 and 5.5 of this thesis, there is a wide variety of statutory compensation provisions that can easily be employed when offenders are sentenced and magistrates can independently and flexibly canvass these options, with or without prosecutor support, as was done in numerous case studies highlighted in subsection 7.2 of this thesis. Furthermore it is not important if a guilty plea is entered and the offender is remorseful because if a compensatory order in a sentence is not complied with criminal sanctions come into force thus eliminating the need for offender acquiescence in most instances as they will therefore comply under threat of sanction.

Fifth, the issue of false claims requires clarification. In this regard, compensation reviews most often arise post-conviction, in sentencing proceedings, such that evidence would have already been tested beyond a reasonable doubt. Moreover, it is unlikely that victims of sexual violence would subject themselves to district surgeon medical examinations,³⁹⁰ difficult cross-examinations, and other hardships to obtain compensation from offenders within criminal proceedings. In fact, research on another social grant programmes for vulnerable persons in South Africa, namely the provision of child grants to teenage mothers, has confirmed that there has not been an increase in false claims or 'increased youth fertility.'³⁹¹

³⁹⁰ Rape Crisis Cape Town Trust (2005: 11) -confirms that 'the [forensic] examination is sometimes embarrassing and uncomfortable' and 'you will be asked to lie down on an examination table and the doctor [who is often male] will do an examination of your entire body including your vagina and anus.' Rape Crisis also confirms that 'your pubic hair may be combed for evidence of the rapist's hair, which will be proof of what happened.'

³⁹¹ Makiwane and Udjo (2007: 7) note that: 'debates about perverse effects of welfare, and proposals for punitive exclusion and withdrawal, have occurred in other countries, also with respect to teen motherhood... Based on the data we have analyzed, we conclude that there are no grounds to believe that young South African girls are deliberately having children in order to access welfare benefits.'

Moving on to **unstructured interviews**, which involved non-standardized, open-ended questions, the High Court role-players provided the following information:

- the High Court judge confirmed that in the hundreds of appeals and minimum sentence proceedings that he has presided over he has never been presented with a request for victim compensation; and,
- the two (2) Advocates who acted on behalf of the Office of the Director of Public Prosecutions noted that in the hundreds of cases they have dealt with in High Court victim compensation had never been reviewed or discussed.

The reasons cited by the High Court role-players for the lack of employment of statutory compensation provisions, along with selected other comments, were as follows:

- The High Court judge confirmed that the majority of offenders are indigent although 'there is nothing stopping [a Judge from ordering compensation along with an incarcerate sentence] because ultimately the minimum sentences are guidelines, [and] at the end of the day we have a residual jurisdiction'; ³⁹²
- The state advocates confirmed that in addition to the majority of offenders being indigent it would be inequitable to provide compensation to a few victims (where offenders have executable assets) and unfair to burden family members of offenders with providing money for compensation orders if offenders are without means. ³⁹³

The High Court role-players, like the Sexual Offence Court role-players also incorrectly suggested that most offenders are unemployed and/or indigent.

³⁹² High Court Interviews in Cape Town (2006) transcriptions on file with author.

³⁹³ High Court Interviews in Cape Town (2006) transcriptions on file with author.

Furthermore, concerns about the source of family funds used to compensate victims should not be a pressing concern for court-role players as evidenced by the judicial interventions in case study 7.2.8 and the Supreme Court of Appeal case of *S v Salzwedel and Others* 2000 (1) SA 786³⁹⁴ whereby the judiciary acknowledged the suitability of third party payees, such as family, in relation to offender compensation orders.

Finally, with regard to the unstructured interviews with two (2) prosecutors from the Commercial Crime Court in Cape Town the following opinions and facts were confirmed:

- Of the sixty five (65) commercial crime court cases finalized by way of conviction, from the middle of 2003 until the end of 2005, forty (40) cases were finalized with compensation orders to victims³⁹⁵;
- One (1) commercial crime prosecutor confirmed that ‘it has happened a few times here that basically the parties just agree on an amount as a guesstimate where it wasn’t very clear what the real loss actually was.’ Also it was noted that ‘you’ll run this big trial that takes months, years of preparation and some of them you do have a strong case and the defense suddenly makes an offer for paying the money back, especially with large banking institutions where the prosecutor is all hyped to pursue this person and see justice is done and suddenly the bank says no, no, no let’s just get our money... unfortunately we do have to follow the wishes of the complainant to a large extent in these kinds of matters, especially where there is compensation involved.’³⁹⁶

³⁹⁴ *S v Salzwedel and Others* 2000 (1) SA 786 (SCA) is reviewed in detail in subsection 2.1.

³⁹⁵ Prosecutor Interviews in Cape Town’s Commercial Crime Courts (2006) transcriptions on file with author.

³⁹⁶ Prosecutor Interviews in Cape Town’s Commercial Crime Courts (2006) transcriptions on file with author.

Commercial crime court prosecutors confirmed that they regularly facilitate CPA compensation for commercial crime victims, which is starkly opposed to the foregoing information from Sexual Offences Court role-players. Moreover, that the financial concerns of commercial crime victims can outweigh concerns of deterrence as provided for in *S v Zinn* 1969 (2) SA 537 (A).³⁹⁷

In concluding this subsection it is important to recall subsection 9(1) of the Constitution which requires “equal protection and benefit of the law.”³⁹⁸ With this in mind interviews in this subsection suggest that although laws and policies are in place to assist victims of sexual violence with their compensatory concerns these laws/policies are rarely canvassed for this vulnerable group while other ‘classes’ of victims in South Africa were provided with abundant compensatory prosecutorial and judicial assistance, (namely commercial crime victims). Bias is suggested as one of many factors leading to this discriminatory behavior because interviews in this subsection confirmed that state role-players did not assist victims of sexual violence with their compensatory concerns because they incorrectly believed that their financial losses were not quantifiable and/or sexual violence victims generally did not want, or need, compensation. Victim surveys in Chapter Eight rebutted these unfounded assumptions and confirmed that many sexual violence complainants were able to list quantifiable damages relating to both their court appearances and post-assault care, and that some of these victims would accept compensation from offenders, or the government, and that modest amounts of compensation would be useful to these victims.

Also a second constitutional concern was identified in the empirical research in this subsection when it was confirmed that prosecutors, judges and state-attorneys “indirectly” worsened the vulnerabilities of victims of sexual violence, who are mostly females, by neglecting their substantive equality rights in contravention of section 9(2) and (3) of the Constitution (which requires the state

³⁹⁷ *S v Zinn* 1969 (2) SA 537 (A) requires a balancing, in sentencing, of matters involving the offender, the crime and the interests of society.

³⁹⁸ Constitution, section 9(1).

to “promote” equality and to desist from “unfairly discriminat[ing]”).³⁹⁹ This constitutional breach occurred indirectly as state role-players, applying gender neutral laws and policies, disadvantaged women sexual violence victims by way of inaction and omissions mainly on account of the gender biases canvassed above (which again wrongly suggested women sexual violence victims did not want or need compensation nor did they have quantifiable losses).

More specifically, upcoming survey research with victims in Chapter Eight found that these biases worsened the existing vulnerabilities of women when they confronted the criminal justice system, and when they sought out post assault health services, as readily available avenues of compensation were preempted outright on account of gender biases and these compensatory sources could have helped victims address their dire post assault access to justice and health predicaments.

³⁹⁹ Constitution, subsections 9(2) and (3).

Also note the discussions on substantive equality in subsection 1.2 of this thesis and footnote 174.

7.1.2 Findings from interviews – oversight of customary arrangements

Structured and unstructured interviews were conducted to distill the nature of customary compensation arrangements in order to ascertain how harmful cultural practices are addressed by criminal justice role-players. More specifically, in 2006 prosecutors and magistrates at Sexual Offences Courts throughout Cape Town were interviewed on the role customary interventions play in the prosecution processes in Cape Town's Sexual Offences courts.⁴⁰⁰

Furthermore, in an unstructured interview, arranged via a South African Police Service (SAPS) conduit, with a well-known community committee member in Cape Town, valuable clarification was provided on how compensation is facilitated by community structures, alongside state authorities.

Finally, in an unstructured interview with a family mediator, information was obtained on processes involved in informal customary mediations in sexual violence incidents. By way of background, the author became aware of the mediator's involvement in such matters at a civil-society criminal justice mediation training workshop where the mediator spoke publically about this issue.

Regarding the first aforementioned research source, in 2006 prosecutors and magistrates participated in **structured interviews** to ascertain how customary compensation arrangements were dealt with in Cape Town's Sexual Offences Courts.

⁴⁰⁰ Nineteen structured interviews were completed in 2006 and each prosecutor/Magistrate was asked the following question: *Have you been assigned to a sexual assault or indecent assault matter where you informally dealt with the compensation needs of the victim? Examples include the following informal customary practices: arranged marriages (baleka/twala), polygamy, lobolo, payment for a cleansing ceremony, damages for adultery and religious rituals.* See subsection 7.1 for the methodology undertaken for all interviews in this thesis and note that many of the below interview comments also appeared in Greenbaum (2008).

Of the ten (10) prosecutors interviewed:

- Four (4) prosecutors indicated they did not deal with customary interventions (two (2) for practical reasons, namely that they recently started working in the Sexual Offences Court or they did not have Xhosa complainants/offenders while two (2) other prosecutors indicated that they simply had not experienced any customary interventions in their prosecutorial duties);
- One (1) prosecutor indicated that customary interventions were rarely brought up in sexual violence matters, having experienced it only once during prosecutorial duties; and,
- Five (5) prosecutors indicated that customary interventions played a role in the prosecutorial process in the Sexual Offences Courts.

Regarding the nature and regularity of customary interventions, some of the prosecutors' comments were as follows:

'Especially with your black South Africans, you often have the mother approach you after she's made a criminal case and she says: 'Look, our families have come together, the perpetrator's family and the victim's family. We have decided or the tribal chief has decided that an amount of R5 000 would be paid for compensation for my daughter for loss of her virginity' or because he deflowered her, for lack of a better word and they sort it out themselves. And even though you as a prosecutor will persist and say: 'But it's a crime. I need to proceed with this matter'; what happens is, they just don't come to Court because according to them they have sorted it out according to their customary law.'⁴⁰¹

'A lot of the time what happens is the families discuss the matter and then they agree on a sum of money that's going to be paid for damages and then the complainant comes to withdraw the case, because one of the questions I always ask the complainants when they come in to withdraw their case is have they been paid any compensation in the way of damages.... its not really openly

⁴⁰¹ Prosecutor Interviews in Cape Town's Sexual Offences Courts (2006) transcriptions on file with author. Note discussion on lobola in subsection 6.1.4. Also note that this quote confirms that customary compensation affects attrition rates.

expressed to us... people don't want to discuss that aspect of it with us, but in a lot of instances my complainants have been honest and said, yes, you know, money has been paid, it's not necessarily even in a domestic violence kind of situation, it can just be in an arbitrary sort of [way], people who know each other, acquaintance situation, where the families meet and a sum of money is agreed upon.' ⁴⁰²

Regarding informal strategies to deal with customary interventions, in light of the fact that there are no legal prescriptions to guide officials, the following comments from prosecutors are noteworthy:

'If you're going to basically ruin a complainant's life by insisting on proceeding with a case we try and find ways ourselves [as prosecutors] to ensure that she is still safe. We may withdraw for instance the rape charge, and proceed on an assault and intent to do grievous bodily harm charge and sentence him to a suspended sentence so it hangs over his head, I know that it does [happen], that compensation sort of comes into that as well. But it comes in on a very informal basis. It's only told to us in consultation. It's not something we incorporate into our own sentencing.' ⁴⁰³

'From the State's perspective we actually have the duty to investigate it properly, to see, you know what are the circumstances of this accused, has he offended before, has compensation been paid before, how much compensation was paid, is it reasonable? I mean is it reasonable in terms of the reasonable person, not in terms of a complainant who is poverty stricken. I mean the reality of it is she may think R200 or R500 is fine, and is that punishment to the accused? Is that sufficient to deter him? Because I mean when you look at sentencing you've got to look at deterrence and rehabilitation and all those things, so I think that it would probably be better if it was done on a more formal manner, where we could actually investigate it and regulate in a more appropriate way.' ⁴⁰⁴

'Sometimes the negotiations will take months and after months they won't agree and then after that the victim's family will come and open a case and through[out] that period a lot of important evidence have been lost for example... if they had reported the matter the same day they maybe could have used DNA evidence against the accused.' ⁴⁰⁵

⁴⁰² Ibid. Note that this quote confirms that customary compensation affects attrition rates.

⁴⁰³ Ibid. See the discussion on composite sentences in subsection 5.1 and note that compensation can still be provided alongside imprisonment.

⁴⁰⁴ Ibid. Note victim survey responses in Chapter Eight which confirm that nominal compensation can be of great assistance to victims of sexual violence.

⁴⁰⁵ Ibid.

Similar findings and commentaries were evident in the magistrates' responses. In this regard of the nine (9) magistrates interviewed:

- Three (3) magistrates indicated they did not deal with customary interventions; and,
- Six (6) magistrates indicated that customary interventions played a large role in the prosecutorial and judicial process in the Sexual Offences Courts.

Regarding the nature and regularity of customary interventions, some of the magistrates' comments were as follows, as informed by witness testimony in their courts:

'What often happens is the tradition is of such a nature that your elders have to talk to the elders of the accused and they decide what would happen and they would pay the parents of the complainant but if she's 18 years or so she can still carry on, on her own, because often the victim is ignored. The parents receive the compensation and the victim still lives in those circumstances.'⁴⁰⁶

'It's usually attached to a certain age group, where your victim falls in a specific age group, 12 to 16.'⁴⁰⁷

'It's not a payment it is just to assist with the cleansing ceremony, in other words it's couched or finessed in a way, they make it seem that it's not for the assault, its for other purposes.'⁴⁰⁸

'Often matters are withdrawn because the complainant feels she cannot proceed because her parents have been compensated in some way or some kind of agreement has been reached between the elders, or the community leaders, and that she can't continue, because if she steps out of the Court this afternoon she doesn't have a home to go to. That's sad, ja, but it happens quite often.'⁴⁰⁹

⁴⁰⁶ Magistrate Interviews in Cape Town's Sexual Offences Courts (2006) transcriptions on file with author.

⁴⁰⁷ Ibid. Note the discussion on male gate-keepers in subsection 6.1.4.

⁴⁰⁸ Ibid. Note the discussion on male gate-keepers in subsection 6.1.4.

⁴⁰⁹ Ibid. Note that this quote confirms that customary compensation affects attrition rates.

'What I've heard quite often is that the accuser's family would give the complainant's mother money to go to a doctor, to first establish whether there was a rape or indecent assault, at a later stage, if it was established that something did happen, money would definitely exchange hands.'⁴¹⁰

With regards to concerns about customary interventions in the judicial process due to a lack of legal prescriptions, the following comments from magistrates were made:

'A lot of the time when a case is withdrawn the prosecutor does not tell me the reason, so I wouldn't know the reason. They just stand up and say the State withdraws the charges, so I wouldn't know what the reasons are, but definitely in court where we've gone to trial, there has been allegations [of customary compensation interventions].'⁴¹¹

'I'm dealing with a case now where the child was raped maybe on the Friday, and the matter is only reported on the Sunday or the Monday, so important evidence DNA evidence is lost, and you ask the mother but why such a long delay and then the street committee would come in. So there is definitely that in the isiXhosa speaking community.'⁴¹²

The above information from prosecutors and magistrates from Sexual Offences Courts throughout Cape Town confirms the widespread use of customary compensation processes and their corresponding influence on formal criminal proceedings. In this regard, it would seem that many prosecutors and magistrates considered if customary payments would detrimentally affect evidentiary requirements relating to witness cooperation, DNA samples and medical examinations and in light of these concerns had to decide if the case should be discontinued. Furthermore, interviews confirmed that most prosecutors and magistrates felt that they did not have a role to play in ensuring that patriarchal customary arrangements did not harm complainants even though

⁴¹⁰ Ibid. Note that this quote confirms that customary compensation affects attrition rates.

⁴¹¹ Ibid.

⁴¹² Ibid.

they were dealing with the same parties in the sentencing proceeding and these agreements can be cited as mitigating considerations that result in reduced sentences for offenders

With the above in mind, by framing the customary arrangements as a private matter between families of the victim and the offender, prosecutors and magistrates sidelined concerns about the safety and recovery of victims. In this regard, emphasis was placed on the nuts and bolts of criminal procedure and punishment namely - “deterrence”, “offender rehabilitation”, “withdrawals”, “DNA evidence” – leaving serious gendered issues, which directly affected the safety and recovery of complainants, in abeyance, such as - the post assault treatment of a “deflowered” virgin; the “arbitrary” and unsupervised nature of withdrawals after customary payments were arranged; and problems of “homelessness” when a victim planned to proceed with her complaint against the wishes of familial, customary and community leaders. Clearly, this approach is at variance with the Constitutional precepts discussed in Chapter Two as complainants’ equality and safety concerns must also be a priority of the criminal justice system.

In addition, it would seem that some of the prosecutors and magistrates engaged in issues concerning customary compensation, while many others ignored this influence thus distorting the even-handedness of the criminal justice system. In this regard, five (5) of the ten (10) Sexual Offence Court prosecutors interviewed for this thesis refused to engage in important customary issues while three (3) of the nine (9) Sexual Offence Court magistrates interviewed sidelined themselves.

Moving on to the informal customary compensation arrangements (that are not supervised by prosecutors or judges) the author also conducted **two (2) unstructured interviews** with community members in order to better understand the dynamics of customary compensation in the Xhosa community and how this community felt about court oversight over these customary arrangements. One of the interviews was with a community leader that regularly assisted complainants with approaching the police and negotiating informal compensation

for sexual violence, and the other was with a male informal family mediator who negotiated a customary compensation settlement in Cape Town.

The first **unstructured** interview was with an executive member of a well-known community organization called the South African National Civil Organization (SANCO). The interview took place in the member's home, in the informal settlement of Khayelitsha and it was facilitated and translated by an accompanying SAPS officer, after obtaining the required approvals from the officer's superiors. The interview was translated from isiXhosa to English and took place in July 2006. To place the interview comments into perspective, the following background information about SANCO is relevant. SANCO is comprised of 'township based civic organizations', acting under an umbrella 'national civic structure', with 'membership dues... retained at a local or provincial level.'⁴¹³ J Seekings further confirms that originally the organization was at forefront of the 'struggles for radical social and economic, as well as political change [during apartheid]' while in the post-apartheid era they now seek to play a part in 'governing towns and villages ... thorough the transfer of functions of government from the state to civil society [including securing the safety of citizens via citizen patrols and informal dispute mediations]'.⁴¹⁴

Furthermore, B Tshehla confirms the following regarding SANCO's safety and security mandate in Khayelitsha: that most of the "well known street committees [in Khayelitsha] are mainly affiliated to SANCO"; that 'a number of street committees (about 4-6) come together and form a SANCO branch'; that 'the committees restrict their jurisdiction to 'bread and butter issues' which involve disputes amount neighbors and family' and 'at least at policy level, relinquished criminal matters to the state' although 'this is not to suggest that SANCO easily released handling of criminal cases - the process has been problematic and gradual with some SANCO branches still holding on to dealing with criminal

⁴¹³ Seekings (1997:1 and 7).

⁴¹⁴ Seekings (1997:3 and 22).

cases [and] some parts of Khayelitsha show evidence of this 'hold' even in 2000 [and as the below interview comments demonstrate perhaps up to 2006]'; and, that 'although there are no structures for chieftainship in the townships, many individuals have strong rural roots [and] having grown up in the rural areas and still having dual residences, many township dwellers still hold that the indigenous African dispute resolution mechanisms, epitomized by the institution of chieftainship, are the answer to the rampant social problems in the black [urban] community.' ⁴¹⁵

With the above in mind, the below comments and insights of the male Executive Member of SANCO, confirm that street committees are still prevalent in urban townships in Cape Town and they enforce a form of customary delictual law. The interviewee advised of the following:

'In Khayelitsha [SANCO's] got 28 branches so they are dealing with issues of rape and murders and they assist police... to find if there is a problem on that. And the street committee, can't take any decision. If there is something, or the case that is turning, whether it is rape or murder, most of the kinds in Khayelitsha),, they must talk to the executive committee of SANCO where they've got to decide... the executive members they're helping – they take that information to the police station and work with the chief and give the information and help with the case... it did happen that the stepfather raped the daughter and the mother didn't want to report the incident... that man was supporting the family... so that thing happened maybe on a street level... [with] the street committees... those things, they are underground... sometimes they take that information to the Courts... but they are not supposed to do that.... they are [first] supposed to report that information to the upper structure [of SANCO] executive committee so they can take a view onto it how that was supposed to be handled...].' ⁴¹⁶

'[With regard to SANCO executive committee involvement in sexual violence cases] these things happen maybe twice or thrice a year... because even the police they have no right to take their information or whatever [without SANCO executive committee involvement].' ⁴¹⁷

⁴¹⁵ Tshehla (2002: 1, 7, 8, 7-8, and 12 respectively).

⁴¹⁶ Community leader interview in Cape Town (2006) transcription on file with author.

⁴¹⁷ Ibid.

'That thing of cleansing is something for the family and the community and the street committee... it is only the family who will decide on it; whether they want to because of our African culture [regardless] the rapist must face the results and must be sentenced while the community is there to see whether the traditional procedures went accordingly.'⁴¹⁸

The comments of this member of an important community structure in Cape Town's largest informal settlement also confirms the patriarchal hierarchy of decision makers and gate-keepers involved in approaching police after sexual violence occurs. In this regard, victims must first report to a male family member who then reports to a street committee, who in turn consults with SANCO executive members who finally decide if police involvement is necessary. In addition it would seem that there is no clear delineation of role-players, nor reporting channels. Clearly, victims are at the whim of arbitrary appointed decision makers and court oversight is desperately needed.

Finally, the below comments of the informal family mediator from the Western Cape, who assisted two families in a sexual violence matter by arranging a financial settlement so that the matter could be withdrawn from the court roll are significant. The comments were derived from an **unstructured interview** that took place in February 2006, at the office of a well-known civil society organization where the mediator was employed, and the mediator noted the following:

'... an amount of 500 has been given just to wash, that is what you call it in Xhosa, to wash the shame [in addition to another undisclosed amount]... we need to give you some money so that you can buy soap and wash this... if this is not coming to an end this will lead to the whole family clutching, looking at each other with great eyes and having grudges between the families and you are staying away from each other ...'⁴¹⁹

'If you take this guy to court or to prison and let him be sentenced, do you think that the relationship between the two families will be alright? The lady said it will not be alright because that is something that is not going to be okay. I asked her, but if you can talk to us and

⁴¹⁸ Ibid

⁴¹⁹ Family mediator interview in Cape Town (2006) transcriptions on file with author.

cancel and withdraw the case from the court I am going to talk to the family, my family and your family. I talked with the older people from my family, went to those parents of that lady. We talked to them and they are convinced that it is important to have a total reconciliation between two families than to put someone into prison for something that did not happened because she was not raped. It was just an attempt and out of the drunk.’⁴²⁰

‘So we came to an agreement that we will make peace to each other and not go forth to court about the case so that the peace between all of us can stay for a long time. There is no more case and the lady is living happier and we are continuing to go to each other, sharing views, and talking to each other...’⁴²¹

‘We don’t believe in going to courts for rapes and those things. We are very ashamed. We are very scared to go to courts as a rape victim because in court there are a lot of people there every day. ... Our women, because of the dignity that they want to preserve, they do not want to appear in court too much because they feel it’s a shame to their tradition of their culture... it is not our tradition that we take people into prison. We are talking between the families if such things are happening until that we call upon the law to take its course if some sort of an agreement is not reached...’⁴²²

The comments of this informal family mediator also confirms the patriarchal hierarchy of decision makers and male gate-keepers involved in approaching police after sexual violence occurs. Furthermore, as with the SANCO scenario, there is no clear delineation of role-players, nor reporting channels, and therefore victims are often dependent on biased patriarchal adjudicators who are not trained to deal with the post assault concerns of victims and who also may be partisan to the offenders concerns. In light of the foregoing it is again suggested that court oversight is desperately needed when informal familial mediators engage in customary compensation negotiations alongside criminal prosecutions.

To conclude, and as emphasized throughout this subsection, the information obtained from the interviews confirm that living customary law practices and informal community based adjudication practices are indeed relied upon by

⁴²⁰ Ibid.

⁴²¹ Ibid.

⁴²² Ibid.

complainants who are also engaged in prosecutorial processes, in sexual violence matters, in Cape Town. As such, the author argues that compensatory customary practices should be reviewed by prosecutors and the judiciary to assist victims with cultural blockages that prevent them from continuing with prosecutorial processes while also simultaneously negotiating customary agreements. This suggestion is important to victims as court role-players can ensure customary agreements assist complainants with monetary relief so they can attend to their post assault recoveries.⁴²³ More specifically, victim surveys in Chapter 8 confirmed that many victims did not avail themselves of free government psycho-medical services, nor did they fully engage the criminal justice system, on account of gendered economic barriers, such as concerns over child care costs or transportation expenses. Furthermore, when there is no court oversight of customary agreements discriminatory treatment will likely occur as the compensatory payments agreed upon may not serve their intended purpose – namely to assist victims and their dependents with post-assault recoveries – but instead may be subsumed by the patriarchal figures that negotiate these informal agreements.⁴²⁴

The above conclusions were also substantiated in the victim survey data in Chapter Eight of this thesis. In this regard, many survey participants referenced issues surrounding informal customary interventions that occurred post-assault.

⁴²³ For example in the case study in subsection 7.2.3 a prosecutor, defense attorney and magistrate who arranged a customary payment of R30 000 confirmed that the money provided to the child complainant 'will be her only chance or only break in life.' Also victim surveys in subsection 8.4 confirmed that victims find customary compensation arrangements important as they provide victims with money to attend to their post assault expenses.

⁴²⁴ For example Mosoetsa (2011) in relation to research conducted in South Africa, confirms at 65, 132 and 133 respectively, that 'cultural tradition tends to keep women subordinate to their husbands, brothers, uncles... [and] if a young women, for example, uses her child support grant for her own or her child's use she is accused of being selfish and irresponsible'; 'specific variables such as gender, generation, marital status and seniority are important factors in understanding household relations and dynamics as these relate to the consumption, production and allocative patterns within households; and 'gender and age largely determine how task are shared and resources allocated within the household.'

⁴²⁵ More specifically, of the forty seven (47) complainants surveyed, eight (8) participants confirmed that there were discussions between the family members of the (alleged) offender and family members of the (alleged) victim on how the sexual assaults should be resolved (sometimes with compensation, other times by referring matters to street committees, and on occasion, by approving the laying of a charge with the police); four (4) participants confirmed that street committees were involved in post-sexual assault resolutions (sometimes suggesting compensation, other times by referring matters to the police); and one (1) participant noted that she felt she could not pursue a criminal case, after withdrawing the charge of sexual assault because the (alleged) offender's family promised her compensation money, which was not provided.

Finally, in concluding this subsection it is important to note that prosecutors and judges “indirectly” worsened the vulnerabilities of victims of sexual violence, who are mostly females, when they did not properly review customary compensation arrangements and were therefore in contravention of section 9(2) and (3) of the Constitution (which requires the state to “promote” equality and to desist from “unfairly discriminat[ing]”). ⁴²⁶ This constitutional breach occurred indirectly as state role-players, applying gender neutral laws and policies, disadvantage women sexual violence victims by way of inaction and omissions mainly on account of the gender biases (which wrongly suggested women sexual violence victims did not want or need customary compensation and that the customary concerns of female victims must be addressed outside of the formal criminal justice system even though offender’s cite customary agreements as mitigating circumstances in which to reduce their sentences). In this regard, gender inequality was heightened, as interviews in this subsection confirmed, that increased attrition rates occurred when sexual violence complainant/ witnesses

⁴²⁵ See subsection 8.4 for complete survey data relating to informal community/customary interventions experienced by victim participants.

⁴²⁶ Constitution, subsections 9(2) and (3).

Also note the discussions on substantive equality in subsection 1.2 of this thesis and footnote 174.

did not attend court after customary settlements were arranged and also that customary compensation was often subsumed by male gatekeepers without court oversight. Furthermore, gender inequality was heightened when victims were pre-empted from having their customary compensation arrangements included in CPA sentencing orders and when victims' customary concerns were not fully canvassed by court role-players as this source of post assault money could have assisted victims with their recoveries.

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7.1.3 Interview Conclusions

The interview data in this subsection confirmed the following:

- Firstly, that victim compensation is rare in sexual violence cases while victim compensation occurs frequently in commercial crime cases. In this regard, magistrates confirmed in interviews, that they presided over one thousand, one hundred and seventy two (1172) sentencing sessions, involving sexual violence, and that they only saw fit to order compensation on four (4) occasions. Furthermore, prosecutors who worked on seven hundred and forty two (742) sexual violence sentencing proceedings only dealt with victim compensation on nine (9) occasions. The above findings should be juxtaposed with interview findings from commercial crime prosecutors in Cape Town who confirmed that of the sixty five (65) successful convictions obtained from 2003 to 2005 a total of forty (40) cases involved compensatory orders at sentencing.
- Secondly, in sexual violence cases there are many misconceptions and biases evident in role-players' rationales for excluding victim compensation reviews and not ensuring customary compensations are properly reviewed and vetted. These involve incorrect gender characterizations, which, in turn, result in adverse decision making patterns as compensation reviews and orders are deemed to be inappropriate from the start. The incorrect characterizations in question were that convicted offenders were assumed to be indigent, uneducated and unemployed; that victims of sexual violence did not require, want or deserve compensation and/or oversight of customary arrangements; and finally that victims' losses could not be quantified because sexual violence involves an insult to the person rather than a disruption in employment, care of dependents and good mental and physical health. Survey findings in Chapter Eight rebutted these assumptions as many victims indicated a preference for compensation from offenders; many victims required state

assistance when navigating between the customary system and the criminal courts; and many victims recited quantifiable losses relating to security, attendance at court, care of dependents, and post assault care.

- Thirdly, state interviewees incorrectly characterized statutory compensation processes as being complex and ill-suited to cases of sexual violence. This occurred despite comments from the High Court judge that acknowledging that the judiciary had residual jurisdiction at sentencing to employ whatever sentence was appropriate irrespective of minimum sentences. Likewise, the case studies reviewed in the next subsection clearly indicate the flexibility of compensatory sentencing provisions, and the ability of court-role players to oversee and vet customary compensation arrangements. More specifically, prosecutors and the judiciary were able to use numerous discretionary processes, as outlined in the upcoming case studies in subsection 7.2, to effect compensation including: compensation orders requiring the transfer of car registration papers rather than liquid currency; or magistrates and prosecutors convening round-table mediations to ensure oversight of customary arrangements or maintenance payments for a child born out a rape; or using un-quantified yardsticks to measure financial losses in violent crime matters (such as the remaining bond obligations of a victim incapacitated by a gunshot wound or requiring payment of the unknown future counseling expenses of a child sexual violence victim).

The interviews therefore confirmed that although laws are in place to assist victims of sexual violence with their compensatory concerns, in criminal and quasi-criminal proceeding (as outlined in Chapter Five), these laws were persistently overlooked by prosecutors, judges and state-attorneys on partly account of biases.

Also it is important to note that interviews confirmed that this conduct of state attorneys, prosecutors and judges, when they overlooked the compensatory concerns of victims, was also discriminatory for two reasons.

First, discrimination was evident as state officials ignored the unique concerns of victims of sexual violence and did not implement positive measures to address blockages caused by biases. In doing so they unnecessarily heightened the disadvantages that sexual violence victims' face, post-assault, because compensation, if awarded, could have assisted these victims with their unique gendered financial losses in relation to court attendances, post assault medical care and security/relocation expenses.

Secondly, discrimination was evident as other 'classes' of victims in South Africa were regularly provided with compensatory assistance (namely commercial crime victims and violent crime victims in general) in contrast to sexual violence victims who are predominately female. Again this differentiation (and favoritism) occurred partly on account of the gender biases held by state officials who assumed that the specific expenses of sexual violence victims, were superfluous and vague, as compared to the expenses incurred by other classes of victims. Also, once again, due to favoritism, role-players unnecessarily heightened the disadvantages that sexual violence victims' face, post-assault, because compensation, if awarded, could have assisted these victims with their unique gendered financial losses in relation to court attendances, post assault medical care and security/relocation expenses.

7.2 Court Case Studies and Table of Cases

Eight (8) court case studies are reviewed in this subsection all of which involve compensation to victims of sexual, and non-sexual, crimes. The methodological approach undertaken in the Case Studies was previously reviewed in subsection 1.4 but it is important to note that the author became aware of the specific cases from prosecutors and magistrates when they were interviewed for this thesis, or alternatively by way of media reports.

The case studies in this thesis seek to demonstrate two phenomena.

First, the wide applicability of CPA and POCA compensatory laws in sexual and non-sexual crime matters and the flexibility of these provisions in relation to minimum sentences, quantum, contribution sources and payment schedules/methods (as found in Case Studies One, Two, Six, Seven and Eight).

Secondly, patterns of biased decision making were also discerned in relation to the following types of cases: a criminal court case wherein customary compensation arrangements were improperly handled (see Case Study Three), a criminal court case wherein the maintenance of a child conceived during rape was improperly canvassed (see Case Study Four), a criminal court case wherein irrelevant adverse inferences were noted by the magistrate in his judgement when a victim sought civil compensation from an employer (see Case Study Five) and finally in a civil forfeiture matter wherein the NPA did not ensure that victims' interests were safeguarded (see Case Study Six).

For ease of reference, the eight case studies are first summarized in table format following this introductory review so that the reader can refer simply to the main aspects each case or to simply compare the eight (8) unique compensation processes that were employed. With this in mind, the Table provides information at a glance on the following aspects of each case:

- First, a brief description of the case is provided;
- Second, the offences and parties are described;
- Third, statutory/administrative processes that preceded sentencing are reviewed;
- Fourth, pre-sentence reports are examined; and,
- Fifth, a summary of the compensation orders granted, or the informal compensation arrangements agreed to is provided.

Following the Table, each case is reviewed in detail. In this regard, within each of these individual reviews, after having identified and commented on the criminal compensation process involved or neglected, the author reviews the possible biases held by the justice officials.

Finally note that the case studies are relevant as they ascertain how Constitutional provisions are adhered to or offended. More specifically, subsection 9(1) of the Constitution requires “equal protection and benefit of the law”⁴²⁷ and the case studies suggest this is not occurring because although laws and policies are in place to assist victims of sexual violence with their compensatory concerns these laws/policies are rarely canvassed for this vulnerable group. Conversely the case studies show that other ‘classes’ of victims in South Africa were provided with abundant compensatory prosecutorial and judicial assistance (namely commercial crime victims in Case Studies Six in subsection 7.2.6, and violent crime victims in Case Studies Seven and Eight in subsections 7.2.7 and 7.2.8). More specifically, these victims were provided preferential treatment as their compensatory orders came about on account of prosecutorial and judicial activism and in addition their compensation orders were incorporated into CPA sentences thus providing a powerful incentive for

⁴²⁷ Constitution, section 9(1).

compliance as default in payment results in penal sanctions. Conversely in the court case studies that involved victims of sexual violence there were disparities in this regard. For example in one case study a victim did not have her customary agreement included in CPA provisions even though the prosecutor and magistrate used the agreement as a reason to reduce the offender's sentence (see Case Study Three in subsection 7.2.3) and another victim did not have her pregnancy/maintenance costs backed up by important CPA provisions as the prosecutors and magistrate arranged for a less demanding civil undertaking instead (see Case Study Four in subsection 7.2.4).

Bias was suggested as one of many factors leading to this discriminatory behavior because case studies undertaken for this thesis confirmed that state role-players did not assist victims of sexual violence with their compensatory concerns because they incorrectly believed that their financial losses were not quantifiable and/or sexual violence victims generally did not want, or need, compensation. Upcoming victim surveys in Chapter Eight rebutted these unfounded assumptions and confirmed that many sexual violence complainants were able to list quantifiable damages relating to both their court appearances and post-assault care, and that some of these victims would accept compensation from offenders, or the government, and that modest amounts of compensation would be useful to these victims.

Also a second constitutional concern was identified in the case studies when it was confirmed that prosecutors, judges and state-attorneys "indirectly" worsened the vulnerabilities of victims of sexual violence, who are mostly females, by neglecting their substantive equality rights in contravention of section 9(2) and (3) of the Constitution (which requires the state to "promote" equality and to desist from "unfairly discriminat[ing]").⁴²⁸ This constitutional breach occurred indirectly

⁴²⁸ Constitution, subsections 9(2) and (3). Also note the discussions on substantive equality in subsection 1.2 of this thesis and footnote 174.

as state role-players, applying gender neutral laws and policies, disadvantaged women sexual violence victims by way of inaction and omissions mainly on account of the gender biases canvassed above (which again wrongly suggested women sexual violence victims did not want or need compensation nor did they have quantifiable losses).

University of Cape Town

- SUMMARY OF CASE STUDIES -

| Case Study No. | Offences and Parties | Processes before Compensation Is Reviewed | Reports/Documents to assist Adjudicators With Decisions on Compensation | Compensation Court Orders or Informal Compensation Arrangements |
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| <p>Case 1 (7.2.1)</p> <p>sexual violence</p> <p>&</p> <p>unknown reason for quantum provided to victim</p> | <p><u>Offence</u> – Jan. 2006 – Khayelitsha, attempted rape, in complainant’s home, undressed victim when asleep and complainant’s family awoke when victim screamed and thereafter confronted offender.</p> <p><u>Offender</u> – Relative of complainant, under 25, unmarried, no children, unemployed.</p> <p><u>Complainant</u> – under 14, student, epileptic. –No counseling obtained before sentencing.</p> | <p><u>Guilty Plea</u> – April 2006.</p> <p><u>s112(2) Criminal Procedure Act (CPA) Statement</u> – Completed.</p> | <p><u>Correctional Service Report</u> – May 2006 – ‘[Complainant, via mother] indicated that she wants accused to be in custody’ – ‘[But] the accused appears to be a suitable candidate for Correctional Supervision.’</p> <p><u>Victim Impact Report (VIR)</u> – May 2006 – Mother of complainant on disability grant supporting two children (R780 per month). – Referred to NGO Counseling by NGO Court Preparation Programme but mother could not attend with her due to ill health so not completed. – The mother of the accused also ‘found it unoffending to offer money in return for the withdrawal of case by the complainant.’ – ‘It is the social worker’s opinion that the trauma suffered by the complainant is such that it cannot be compensated through monetary terms but only with therapeutic counseling, which at present the family has not yet accessed.’</p> | <p><u>Correctional Supervision Order Attaching a Compensation Order</u> – June 2006 – ‘Pay compensation or damages to the amount of <u>R500.00</u> to the following victim: <u>X</u> born <u>X</u> on behalf of <u>X</u> born <u>X</u> paid into Clerk of Court for Khayelitsha on 2/16/06.’</p> |

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| <p><u>Case 2</u> (7.2.2)</p> <p>sexual violence</p> <p>&</p> <p>victim's future therapy expenses</p> | <p><u>Offence – 2003</u> –Cape Town, indecent assault against a male child by an adult male offender, complainant disclosed assault to mother.</p> <p><u>Offender</u> – Previously co-habiting with victim and his family and was a father figure to complainant, under 50, unmarried, no children, employed, prior alcohol abuse and convictions for drunk driving.</p> <p><u>Complainant</u> – under 10, student. – No counseling obtained before sentencing.</p> | <p><u>Guilty Plea</u> – May 2005.</p> <p><u>s112 CPA Statement</u> – Completed.</p> | <p><u>Correctional Service Report – February 2006</u> – ‘Suitable candidate for correctional supervision sentence should be placed under house arrest, should also do community service and be put into [sexual offender] programs.’ – ‘The accused should take financial responsibility should or if the victim is undergoing any counseling.’</p> <p><u>VIR– August 2005</u> – ‘The family lives in a single room as this is all the mother can afford at present, lives with mother and two [child] siblings.’ – ‘The victim has also not received any therapy, which is absolutely essential for him to recover effectively.’ – ‘Academic performance was negatively affected.’</p> <p><u>Probation Officer Report – August 2005</u> – ‘[Offender] prefers [his parents and siblings] not knowing and that he is not comfortable with worker making contact with them either.’ – ‘He has also not disclosed to his family that he has committed the present offence and that he is guilty’, but attempts were made by Probation Officer to contact offender’s parents despite above circumstances, but these attempts were unsuccessful.</p> | <p><u>Correctional Supervision Order Attaching a Compensation Order- February 2006</u> – ‘accused pays the costs for any counseling and or treatment that may be prescribed and undergone by the victim X, in connection with this case.’ - ‘The accused submits him to all treatment, therapeutic, rehabilitation programs or lectures as prescribed by the Commissioner which is aimed at the rehabilitation of the accused and/or to cure him of any mental disease or declination. Any costs connected to such programs and/or lectures can be recovered from the accused.’</p> |
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| <p>Case 3 (7.2.3)</p> <p>sexual violence & damages relating to custom and culture</p> | <p><u>Offence – 1997</u> – Guguletu, one count of rape, in complainant’s home, disclosed to teacher who reported matter to mother.</p> <p><u>Offender</u> – Relative of complainant, under 55, married, children, employed.</p> <p><u>Complainant</u> – under 10, student. – <i>Affidavit of Complainant – signed August 2004</i> – ‘after the incident he was watching me when I washed and touched me all over; he had sexual intercourse with me for about 2 more times at home.’ – Unclear if counseling obtained before sentencing.</p> | <p><u>Guilty Plea – April 2005.</u></p> <p><u>s112 CPA Statement</u> – Completed and noted ‘since the day the complainant told her family about this incident I never denied anything at all and further I called all the families involved and sincerely apologized for my stupid actions.’</p> | <p><u>Correctional Service Report – June 2005</u> – Offender ‘wished to open up a fund for the child, and pay on monthly installments [and] the family of the complainant wished the accused to pay damages.’ – Suitable candidate for 276(1)(h) Act 51 of 1977.</p> <p><u>VIR/Probation Officer Report – June 2005</u> – ‘The accused is also prepared to pay for the medical bills or any other intervention, psychologically and otherwise for the complainant, which will actually assist the [complainant’s] family in terms of dealing with the after effects of this offence. So I fully agree with the correctional supervision sentence.’ – ‘There will be further intervention with the family [of the complainant and the family of the offender] in terms of addressing the problem amicably however they would like him to be sentenced, to be given a sentence which is outside of the prison.’ – ‘The victim, the complainant, in this case, also is of the opinion that the accused must not be sentenced to a jail sentence, however he can be sentenced to an outside sentence.’</p> <p><u>Prosecutor submissions – June 2005</u> ‘I am also going to ask the Court to impose a suspended sentence of imprisonment.’</p> | <p><u>Informal Court Supervised Customary Compensation Undertaking - June 2005</u> - <i>sentencing transcripts</i></p> <p>[Court] Was this a traditional agreement or was this purely a financial agreement?</p> <p>[Defense] It was some form of saying to the family we are sorry about what happened... that's why my colleague [the Prosecutor] as well was indicating, at the time we were in consultation with the families that this issue is going to be dealt with amongst ourselves.</p> <p>[Court] This undertaking [to give R30 000 compensation] will be given in writing to the family of the complainant [as it is not in the sentencing court order].</p> |
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| <p>Case 4 (7.2.4)</p> <p>sexual violence & victim expenses relating to a child born from rape</p> | <p><u>Offence – July 2003</u> – Khayelitsha, sexual intercourse with a girl under sixteen, drank at shebeen with complainant and then went to his residence where they had intercourse. – Disclosed when child became pregnant.</p> <p><u>Offender</u> – under 30, unmarried, two children (in addition to the child born from this case), unemployed.</p> <p><u>Complainant</u> – under 15, student. – Unclear if counseling obtained before sentencing.</p> | <p><u>Guilty Plea – May 2005</u></p> <p><u>s112 CPA Statement</u> – Completed and noted ‘a few months later I was contacted by the Complainant and her mother who informed me that the complainant was pregnant. A baby girl has been born as a result of this liaison between myself and the complainant.’</p> | <p><u>Correctional Service Report – May 2005</u> – ‘The mother of the victim stated that he must support both the victim and the child. She wants the accused to support the child and accept responsibility for his actions. The family requested the court to sentence the accused to a sentence that would allow [him] to find employment and support the child.’</p> <p><u>VIR</u> – Unknown if completed as no VIR in the court file and court transcripts could not be obtained to see if entered into evidence.</p> | <p><u>Informal Court Supervised Compensation Undertaking – Sept. 2005</u> - Prosecutor indicated in interviews that arrangements were made between the families to support the child born as a result of the sexual assault but this was not reflected in the Correctional Supervision Court Order.</p> |
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| <p>Case 5 (7.2.5) sexual violence & victim's employer</p> | <p><u>Alleged Offence</u> – March 2005 – Hout Bay, indecent assault, rubbing complainant with clothes on, at place of employment, disclosed three months after alleged assault, namely June 2005, by complainant to police.</p> <p><u>Alleged Offender</u> –under 40, supervisor at work, found not guiltily.</p> <p><u>Complainant</u> –under 35, employee, single parent, breadwinner of family.</p> | <p><u>Plea of Not Guilty</u> – Jan. 2006</p> <p><u>Not Guilty by way of s174 CPA Application</u> – July 2006</p> <p><u>s112 CPA Statement</u> – Not applicable.</p> | <p><u>Pleadings/Complaints</u></p> <p>a) CCMA complaint filed regarding constructive dismissal – May 2005.</p> <p>b) Conciliation certificate noting that matter may be refereed for arbitration – June 2005.</p> <p>c) Commissioner, Post Hearing Department CCMA Western Cape – November 2005. – ‘Constructive dismissals based on allegations of sexual harassment fall within the ambit of alleged automatically unfair dismissals, which the CCMA may only arbitrate should both parties consent as such in writing. Having considered the alleged reasons for dismissal, the correct forum for this matter is that of adjudication by the Labor Court and the matter should be referred to that forum accordingly.</p> <p>d) Researcher attended Labor Court but there was no file in the database with the names of the said parties.</p> | <p><u>Sentencing Court Transcripts (and adverse inference when victim pursues compensation)</u> <i>- not guilty judgment</i> July 2006</p> <p>[Court] ‘in cross examination complainant said she refereed this matter to CCMA, and to the Labor Court on the ground of sexual harassment on 17 May 2005. It was further highlighted that the complainant had a similar Labor Court matter in respect of a constructive dismissal against a previous employer during 2001 which was settled out of court.... Long delay for the matter to have been reported... [and] after she received written warning regarding her performance.’</p> |
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| <p>Case 6 (7.2.6)</p> <p>sexual violence & State forfeits car, and preserve home, wherein sexual violence occurred and victims can seek assets thereto.</p> | <p><u>Alleged Offences – throughout 2004 and 2005</u></p> <p>– Nine complainants, allegations of intercourse with girls under sixteen as committed in the alleged offender’s home and car. Car forfeited to State while home subject to preservation not forfeiture.</p> <p><u>Alleged Offender</u></p> <p>– Over 50, German, married, children, director/shareholder of RSA residence subject to forfeiture process.</p> <p><u>Complainants</u></p> <p>– Minors, court file notes some students, ‘poverty stricken’, ‘live in overcrowded dwellings.’ Inconsistent therapy.</p> | <p><u>Analogous to a Plea of Not Guilty</u></p> <p>Alleged offender absconded from RSA before warrant of arrest issued and now in Germany and extradition unlikely. He asserts from Germany, in forfeiture pleadings, that he thought complainants were all over 18 years old.</p> <p><u>s112 CPA Statement</u></p> <p>– Not applicable as forfeiture uses mostly civil procedures,</p> | <p><u>Pleadings/Complaints</u></p> <p>–The offences for which criminal proceedings were initiated, were also offences listed in Schedule 1 of POCA, and therefore forfeiture processes were undertaken for the car (a BMW) and house (valued at 3.7 million in Jan. 2007 wherein the abuse took place. The alleged offender admitted in affidavit evidence that he ‘engaged in sexual activity there [at the house subject to forfeiture proceedings]’ with two complainants.</p> <p>– <i>The founding affidavit:</i> indicated that the alleged that the offender ‘broke the hymen of one of the children who was X’ and ‘deflowered [a complainant] whilst she was under the age of X’ and ‘committed at least 23 lewd acts with the children in his vehicle.’ Finally it was noted that ‘a child who was introduced to the first respondent became a prostitute after her first sexual encounter with the first respondent, while she was still a virgin.’</p> | <p><u>Possible Execution of Assets by State for Complainants</u></p> <p>- <i>Cape Law Society Complaint - State Attorney Report – 11 Sept. 08</i></p> <p>‘I can state on record that the AFU has no objection in the case of a forfeiture order being granted to use the proceeds of the sale of the property to pay the victims if they are successful in obtaining a civil judgment against the perpetrator’;</p> <p>- <i>NPA letter – 24 April 08</i></p> <p>‘the children do potentially have a civil claim for damages... however it is not the mandate of the AFU to pursue such claims on behalf of the children’; and ‘we will certainly request the investigating officer in this matter to advise the victims of their rights [and] we will also request that he refer them to a social worker in the area to assist them in pursuing their claims should they wish to do so.’</p> |
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| <p><u>Case 7</u> (7.2.7)</p> <p>robbery /assault</p> <p>&</p> <p>car license given to victim with police and NPA help as offender had no other money</p> | <p><u>Offence</u> –Nov 2003 –New Cross Roads, robbery of R19 700 from company manager, by two offenders, with aggravating circumstances as the complainant was threatened with a firearm and assaulted.</p> <p><u>Offender</u> – under 30, widowed.</p> <p><u>Complainant</u> – Factory manager and company itself. – Unclear if counseling obtained before sentencing despite confirmation that ‘the complainant suffered emotional trauma when he was threatened with a firearm... while the accused pushed him.’</p> | <p><u>Guilty Plea</u> – March 2005</p> <p><u>s112 CPA Statement</u> – Not necessary as 105A CPA Agreement completed.</p> | <p><u>Correctional Service Report</u> – Not Applicable.</p> <p><u>VIR</u> – Unknown if completed as no Report in the court file and court transcripts could not be obtained to see if entered into evidence.</p> <p><u>105A CPA Agreement</u> – ‘The accused is the lawful owner of BMW motor vehicle registration number X and is prepared to transfer this vehicle to the complainant as compensation for the loss suffered.’ – ‘The substantial and compelling circumstances in terms of section 51(3)(a) of the Criminal Law Amendment Act, No105 of 1997, which justify a sentence less than the prescribed minimum sentence are as follows: (a) Even though the complainant was pushed by the accused, he sustained no physical injuries; (b) The accused is HIV positive; (c) The accused has shown genuine remorse and is eager to compensate the complainant (d) The accused himself did not wield the firearm; (e) The accused was not aware that his co-perpetrator has a firearm.’</p> | <p><u>Imprisonment and Suspended Sentence with Compensation Provision</u> -Agreement in terms of Section 105A of Act 51 of 1977 (As Amended) – ‘It is agreed that the following is a just sentence in the circumstances of the charge mentioned above: 10 years imprisonment of which 3 years imprisonment is suspended for 5 years on condition that the accused is not convicted of robbery during period of suspension and that ownership of motor vehicle, BMW 1991 Model registration no CA XXXXX is transferred to complainant on or before 1 April 2005.’</p> |
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| <p><u>Case 8 (7.2.8)</u></p> <p>attempt murder with severe gunshot injuries to victim</p> <p>&</p> <p>payment of victim's house bond by offender</p> | <p><u>Offence</u> –May 2004 –Cape Town, attempted murder, complainant sustained gunshot wound in stomach, in complaint's home where the offender was also residing.</p> <p><u>Offender</u> – under 45, married, step-children, employed.</p> <p><u>Complainant</u> – under 65, 8 months in hospital post assault, 10 operations post assault and lost his job due to the assault. – Unclear if counseling obtained before sentencing.</p> | <p><u>Plea of Not Guilty</u> –Guilty judgment October 2006.</p> <p><u>s112 CPA Statement</u> – Not applicable.</p> | <p><u>Correctional Service Report – Dec 2006</u> – ‘The accused’s personal circumstances deem him a suitable candidate for a sentence of Correctional Supervision in terms of Section 276(1)(h) of the Criminal Procedure Act 51 of 1977. However the accused does not accept full responsibility for the offence and it is therefore up to the Honorable Court to determine if Correctional Supervision is a suitable sentence.’</p> <p><u>VIR – October 2006</u> – ‘the complainant and his wife have been staying in their house for 13 years now. Unfortunately they have to sell the house now because they cannot afford the bond payments.’</p> <p><u>Original Sentence – February 2007</u> – ‘The Court will now take into account whether there are any substantial or compelling circumstances warranting a lesser sentence than five years imprisonment and the Court finds that there is no such substantial or compelling circumstances and therefore you are SENTENCED TO A TERM OF 5 (FIVE) YEARS IMPRISONMENT.’</p> <p><u>High Court Appeal Order – August 2008</u> – ‘the sentence of five years imprisonment ... is hereby set aside... [and] remitted back to the Regional Court... [for] evidence in mitigation.’</p> | <p><u>After Appeal -Suspended Sentence with Compensation Provision</u> -August 2008 ‘Accused is sentenced to five (5) years imprisonment suspended for five (5) years on condition accused is not convicted of any offence of which the offence of assault is a competent verdict committed during the period of suspension and for which offence a sentence of imprisonment without the option of fine is imposed. It is further ordered that the amount of R60, 000 paid by the Accused to the Clerk of the Court, Cape Town to be held in trust in connection with this case, pending appeal, be paid into Standard Bank Home Loans Account no. XX, Branch XX’</p> |
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7.2.1 Court Case Study One (unknown reason for compensation)

This case is helpful as it demonstrates the adaptability of CPA compensation orders in sexual violence cases. This furthers the argument in relation to bias because it clearly shows that compensatory provisions, although currently rarely utilized in sexual violence matters (as confirmed in interviews and surveys in Part 5), are available and easily adaptable even where offenders are unemployed.

This case involved an attempted rape and a 500.00 Rand compensation order was attached to a correctional supervision sentence to assist the indigent victim. As background information, the following aggravating circumstances were noted in the documents in the court file and they shed light on the nature of the crime and sentence imposed: the crime took place in the minor complainant's home; the offender was an authority figure; the minor complainant had a physical disability; and the offender's family unsuccessfully offered payment to the complainant's family in return for a withdrawal of the case.

It must also be noted that although the compensation provided in this case was for a nominal amount, the surveys in Chapter Eight suggest that small amounts of compensation can meaningfully assist indigent survivors with their attempts to access post assault services. In this regard, the victims' family in this case study was in financial distress, surviving off social grants, and it was confirmed by the complainant's mother that government services were not accessed by the complainant because they did not have transportation and childcare money.

Finally note that the prosecutor assigned to this case confirmed the following:

'The person is not employed but he was asked to go and look for a job and the family of him they said they will assist that he pays the compensation towards the victim...It was attempted rape...The victim I think she was about 14 [and the offender 18]...He was in the process of undressing the woman when the woman woke up and cried... No, there was no contact ja he will get correctional supervision coupled with a suspended sentence as well as a compensation order.'⁴²⁹

⁴²⁹ Prosecutor Interview in Cape Town's Sexual Offences Courts (2006) transcription on file with author.

7.2.2 Court Case Study Two (future therapy costs as compensation)

This case is helpful as it demonstrates the flexibility of CPA compensation orders in criminal proceedings when sexual violence is involved. This furthers the argument in relation to bias because it clearly shows that compensatory provisions are available and easily adaptable in sexual violence cases but as noted in interview, case study and survey data in Part 5 they are infrequently used.

In this case a male offender was convicted of indecent assault of a male child while the offender was living in the household. The court made an un-quantified compensation order for future counseling by way of a correctional supervision non-custodial sentencing order. Many conditions were attached to the correctional supervision in addition to the compensation order, such as payment by the offender for his own therapy. The prosecutor noted the following particulars with regard to the ad hoc quantification process:

'the accused wanted to contribute in some way to the child's wellbeing, so yes, it has been quantified as such, because the child still has to go for counseling and it will have to be determined you know how much is it going to cost... it's the first time I have done it so we will see how it goes, how it pans out.'⁴³⁰

⁴³⁰ Prosecutor Interview in Cape Town's Sexual Offences Courts (2006) transcription on file with author.

7.2.3 Court Case Study Three (customary damages)

This case study reveals that prosecutors and judges often are guided by biased assumptions (that result in discriminatory outcomes) when dealing with customary compensation settlements that take place alongside criminal prosecutions.

Before reviewing the particulars of this matter it is first important to note that methodological considerations regarding this Case Study were previously reviewed in subsection 1.4. This methodological review also contains information on action research priorities that guided a round table discussion that took place for this Case Study, post adjudication, which was attended by the offenders' lawyer and the prosecutor.

In this Case Study a R30 000.00 customary compensation settlement was negotiated by the families of the rape victim and the offender, via court supervised mediation. More specifically, a customary compensation agreement was facilitated by the prosecutor after the defense lawyer unilaterally approached the State, prior to the sentencing proceedings, and suggested that compensation could be provided to the victim by the offender. Thereafter a formal mediation took place to canvass the offer which was attended by the prosecutor, the victim's family (namely her mother and an uncle who had been making decisions on behalf of the complainant throughout the trial process), the convicted offender, and the convicted offender's lawyer.

As discussed previously, this situation is not unique as informal family negotiations and customary rituals often take place after sexual victimization occurs and these processes often intersect with criminal prosecutions and formal court proceedings in the Sexual Offences Courts.⁴³¹ Despite the foregoing, there are no prosecutorial guidelines on how to deal with this phenomenon and therefore court role-players in most criminal cases, and in the within Case Study, do not ensure that cultural agreements are incorporated into formal criminal sentencing provisions which can result in penal sanctions upon

⁴³¹ For a review of the customary processes that intersect with sexual violence prosecutions see subsection 5.4, Chapter Six, interview findings in subsection 7.1.2 and survey findings in subsection 8.4.

default.⁴³² In this Case Study the customary agreement was not included in the criminal sentence and therefore civil remedies would have to be instituted if there was a default in payment. This is despite the fact that a case law precedent exist for such an approach, namely *S v Maluleke* 2008 (1) SACR 49 (T) where customary arrangements were included in a suspended sentence in a murder case.

It is suggested that this lack of proper oversight by the prosecutor and the magistrate - when they forewent attaching the compensatory cultural agreement to CPA sentencing provisions - was partly on account of biases. In this regard, despite obvious gender imbalances that exist when male figureheads negotiate informal customary settlements on behalf of child sexual violence victims, state role-players in this case study felt that the arrangement was a private matter under customary law and therefore it did not require state oversight. More specifically they viewed the financial agreement as a symbolic exchange rather than a way to meaningfully compensate the victim for her post assault economic losses via penal sentencing legislation. This logic is not gender sensitive especially as the offender's interests were fully canvassed when he was able to use the compensation offer as a mitigating factor to avoid imprisonment via a suspended sentence while conversely the victim's interests was never fully reviewed and protected (including placing the compensation in the Guardian's Fund to ensure oversight when used⁴³³). This approach supports Joan Williams' notions of discrimination as she suggests that "women are disadvantaged not merely by a single rule or interpretation but by processes involving many different actors motivated by a

⁴³² Plasket J confirmed, in *S v Marais* 2009 (1) SACR 299, that in cases involving sexual violence, that 'provision[s] allows, inter alia, for the payment of compensation to be made a condition for the postponement or suspension of sentence... [and] section 52(1) of the *Correctional Services Act* provides for the payment 'of compensation or damages' as one of a number of possible conditions to be attached to a sentence of community corrections, which, in turn, may include a sentence of correctional supervision in terms of s 276(1) (h) or s 276(1) (i) of the *Criminal Procedure Act*.'

Also note the case of *S v Salzwedel and Others* 2000 (1) SA 786 wherein the Supreme Court of Appeal ordered compensation for minor children of a deceased victim, by way of conditions attached to a partly suspended sentence as it 'would constitute an inducement to the respondents to continue to pay into the Guardians Fund the installments which Jones J [the sentencing judge] had directed for the benefit of the minor children of the deceased.

⁴³³ In *S v Salzwedel and Others* 2000 (1) SA 786 the court ordered the offender to pay compensation to the dependents of a murder victim and to place this compensation in the Guardians Fund . This order was also included in a partly suspended sentence.

variety of stereotypes of which they are barely conscious or blissfully unconscious... [and in these situations] women's disadvantage stems not from a single male norm kept in place by a single institution or actor, but rather from many people (women as well as men) acting in a decentralized way who are driven by (often unconscious) stereotypes."

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The following additional issues were clarified in this Case Study, namely:

- Why was the customary arrangement structured in the civil law, rather than the criminal law:
- How did the role-players quantify the damages:
- Do minimum sentencing laws affect the use of compensatory provisions.

With regards to the first issue, namely the use of civil law to enforce the customary compensation agreement rather than criminal law, it was clear throughout the sentencing proceedings the prosecutor and the magistrate differed with the offender's lawyer on the classification of the payment arrangement. In this regard, the offender's lawyer classified the payment as symbolic - to avoid having the payment terms included in the offender's sentence - while the prosecutor and magistrate constantly referenced customary signposts and characteristics. It is suggested that the isiXhosa speaking defense lawyer refused to acknowledge customary law influences as he considered them to be outside of the formal court process and therefore not within the moral or legal jurisdiction of the court. Despite the foregoing the below interview comments are illustrative of the fact that customary influences did play an important part in the sentencing proceedings as they influenced the perceptions and decision making rationale of the prosecutor and the magistrate, irrespective of the defense lawyer's position.

⁴³⁴ Joan Williams (2000:216 to 217).

Firstly, in the sentencing court transcripts the following was noted:

[Magistrate] 'This amount and the agreement that they came to [to compensate the victim for rape], was this a traditional agreement or was this purely a financial agreement, where did this come from?' ⁴³⁵

[Defence Lawyer] 'Your Worship it was very difficult to weigh the damage, its not like a civil action whereby there are damages which have to be paid by the accused, no Your Worship, but it was some form of saying to the family we are sorry about what happened, this will cover things like bills.' ⁴³⁶

In the post hearing round table interview session, with the prosecutor and the defense lawyer, the author sought to clarify the above sentencing submission. In this regard, comments at the round table illuminated that customary traditions did play a large role in the compensation agreement in this case, despite the questionable contestations of the defense lawyer in the sentencing proceeding above, and these traditions also were aligned to prevalent community expectations. In this regard, they advised of the following:

[State Prosecutor] 'I was present for 'the initial sort of talks and the introductions [at the offender/victim mediation session]' but 'because it was more of a, sort of, cultural issue between the families, I excused myself and I allowed them to talk because they would be able to reach an agreement better if [I was not there] - while I'm not there because I didn't understand their cultural backgrounds [with regards to customary damages being paid]... it was sort of a cultural agreement on damages also it would sort of be very dire for him if he does breach that at the end of the day so their concern would not so much be the civil recourse or the criminal recourse. Theirs would be within their culture you know because for them that would have more meat than the actual criminal order or the civil order at the end of the day because it was an agreement reached between the families and we just wanted to cover them. That's all we said. Look just put something down in writing even if it's just as simple as it is so that if anything does go wrong then we at least have something.' ⁴³⁷

[Defense Lawyer] 'We are in the cities here where we talk about money, you know, and the family is stressed out, you know, during the negotiations, that this is **not** the compensation for the damages which the child has

⁴³⁵ Sentencing transcripts in an unreported case (2005) on file with author.

⁴³⁶ Ibid.

⁴³⁷ Prosecutor Interview in Cape Town's Sexual Offences Courts (2006) transcription on file with author.

suffered, this R30 000. It's just – and even the defence stressed out that this is not a compensation but it's just some form of a gesture and some form of saying we apologise for what he has done. There is no law in our country which forces us to do this but we decided to come with this offer on the table... it was something which came straight from the defence that we are going to make an addition to what – although we knew from the beginning that the accused may not serve direct imprisonment but in addition to the sentence which he got from Court, which we knew that it was going to be an outside sentence. There must be an additional punishment which he has to get... but although they stressed it clearly to them that it's not the compensation for the damages which had been sustained by the victim but it's just only a gesture which he is offering just to say we apologise for what has taken place. There is no-one who have forced the defence, you know, or forced the accused to come up with this decision.

'This was a case whereby the whole family had to keep it inside the family. Those are the other aspects which were taken into consideration by the State, you know, in coming to the offer which – to accepting the offer, you know, because you will find out there was consultation, numerous consultations which was done by the State between the State and the complainant, you know, in which the complainant clearly stated that she doesn't want her uncle to go to jail and all that. And then there was also some other consultation with the family, that is, the uncle or whatever, you know? That is now – this issue is an issue whereby the family wanted to keep it within the family, you know, and the defence making the offer of the compensation... But we decided to create that good environment within the family because we know that these people at the end of the day will be staying not far from each other. We decided there must be compensation because at the end of the day if the sentence of the 276(i)(h) would have been imposed, but it would not have served any purpose to the other people who see the accused now in the house, you know, and nothing else because they would have seen him walking, going to work, not understanding what is happening and then they would have come and questioned the State and said: 'This person has committed a rape but he is outside. Where is justice', you know? But we decided we can come up with this offer so that we can try and avoid those doubts, you know, to the people, that is, the laypeople or maybe to the families of the victim and which, at the end of the day, they appreciated the offer which was made.'

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Two main concerns arise with respect to the above comments in relation to the lack of court oversight over the customary compensation settlement and their reliance on civil law enforcement mechanisms rather than the criminal law. Firstly, the State role-players in this case study, namely the magistrate and prosecutor, did not engage an

⁴³⁸ Defense Lawyer Interview in Cape Town's Sexual Offences Courts (2006) transcription on file with author.

authoritative customary legal source, after acknowledging a customary process was underway, to ascertain how to align the criminal sentencing process with this important influence. Simply put, it was a 'hands-off approach' whereby the 'process' marched on without concern for the 'undocumented sub-content' and the 'living subjects' of the criminal proceedings.

Secondly, the defense lawyer took advantage of the ambiguous cultural influences at stake in the sentencing proceeding by suggesting that customary processes were not being invoked by the offer of compensation but rather the proposal was simply an apology with some money to cover bills resulting from the sexual violence. In this regard, he attempted to blur the influence of customary practices, and community expectations, when he suggested that the apology would help to keep this matter "in the family" only to contradict himself later on when he suggested that the large compensation agreement would also serve as a deterrent to the larger community. The point to be taken from these discourses is that cultural or community influences were repeatedly acknowledged in this case by the defense lawyer yet he was not forthcoming to the court on the exact nature of these influences and the related community expectations in relation to the compensation agreement.

The above two concerns – namely, the hands-off approach of the prosecutor and magistrate regarding customary authority, and the defense lawyer's avoidance to frame the compensation in terms of customary law - require some reflection. To begin, the role of agency must be acknowledged. In this regard it must be noted that perhaps the victim and her family may have wanted financial compensation, and therefore they might have relied upon their own agency to obtain money through customary and community-endorsed sanctions to ensure their post-assault recoveries were looked after. They might have taken such a position without having a firm attachment to customary rituals/traditions but rather were happy to use these customary arrangements as a vehicle to serve their own post assault needs. Such an approach was canvassed in subsection 6.1.3 of this thesis in relation to agency.

In addition to agency issues, it must also be acknowledged that the magistrate was a white Afrikaans speaking woman, while the prosecutor, was a coloured Afrikaans speaking woman. It became self-evident that they were both not knowledgeable of Xhosa culture and language and therefore they were culturally blind when the compensation issue arose in the sentencing proceedings, as it related to a complaint of sexual violence between two Xhosa individuals. The source of this cultural blindness lay in the normative colonial legal discourse they employed. This is not a new phenomenon – the intersection of a limited ‘colonial discourse’ in legal proceedings where the parties are all of Black African descent. In this regard, A Mager, in *Gender and the Making of a South African Bantustan*, notes that, in the former Ciskei, a ‘colonial discourse’ existed in court proceedings, based on ‘a historically specific relationship between law, discourses of appropriate gendered behaviors, and state power’. She suggests this discourse was evident in court proceedings involving sexual violence and this discourse fundamentally ‘contrasted sharply with the views of African intellectuals.’⁴³⁹

Furthermore, and most recently, M Motsei, in *The Kanga and the Kangaroo Court; Reflections on the Rape Trial of Jacob Zuma*, confirms that ‘as far as the administration of justice is concerned, a common practice remains one that upholds ideas that reflect the classic Western approach... [and] this means that Africans are still judged on the basis of the laws that are not in harmony with the ways in which their communities (and life philosophies) are structured.’⁴⁴⁰

With the above comments on culture in mind, it can be said that the neglect of customary references and sources, as it relates to the customary compensation arrangement in the Case Study, likely resulted from a limited, Western focused, colonial legal discourse, currently employed by the formal court actors (namely the magistrate and prosecutor), and secondly, a concern by non-state parties (such as the complainant, and her family, and the offender, and his defense lawyer) that community expectations and customary practices cannot be fully understood by the formal court

⁴³⁹ Mager (1999: 183-184).

⁴⁴⁰ Motsei (2007: 188).

system because of cultural and colonial blockages and legacies. With this in mind, VIRs and CSRs should have comprehensively dealt with the cultural concerns present in this case rather than just framing the compensation offer by the offender in over-simplified terms without any reference to community expectations and cultural imperatives. In this regard the VIRs and CSRs classified this arrangement as a gracious offer from a repentant offender rather than delving deeper into cultural and community obligations that laid the foundations of this offer.

The second issue that requires clarification in this case is how the compensation was quantified. Unlike civil processes, one of the benefits of statutory criminal compensation provisions is that qualification can be done on an ad hoc basis, without actuarial reports and financial statements, taking into consideration the needs of the victim and the means of the offender. In this regard the defense lawyer's submission at sentencing, as set out below, is illustrative.

[Defense Lawyer] 'We came to an agreement of R30 000 which would be paid by the accused. We tried to determine the age of the accused and then the purpose of him to retire in the next 7 years and which if he is paying this R500 a month then maybe at the age of 63 he will be able to pay and furthermore there are close friends who attended to make a contribution, a certain lump sum of money with which the R30 000 could be covered, but do not want to rely specifically on the extended families, we decided to rely specifically on him, on his salary.' ⁴⁴¹

The final issue that requires clarification concerns minimum sentences and their influence on compensation orders. The magistrate in this case addressed this issue in her sentencing order below when she acknowledged that non-incarcerate sentences are sometimes appropriate for serious sexual crimes, irrespective of minimum sentence legislation, if compensation is provided as this is an important mitigating factor and an important "substantial and compelling" consideration .

[Magistrate] 'So serious are these crimes that the Legislature had set certain minimum sentences that the court must impose when the offender is found guilty of these crimes. If the accused had committed this a few years later then he would have been referred to the High Court for a minimum

⁴⁴¹ Ibid.

sentence of life imprisonment. And this now brings me to the part where the community's interest has to be taken into account. Usually when an offender is found guilty of such a rape of a minor, then the community which includes the complainant and her family, vehemently demand a long prison sentence without grace because they feel the offender must be removed out of the community so that he cannot do so again. But this complainant and her family is asking that the accused should not be sent to prison; they themselves have talked it out in the family circle and they are of the opinion that the accused will be of more value outside than inside (the prison). This already is unique and then the agreement to pay a sum of money in order to help the complainant is even more unique in this scenario. Initially the court was very hesitant concerning any other sentence than imprisonment. But the accused is advanced in years and the family itself pleads and asks that the court should not impose a prison sentence. And maybe this monetary contribution to the complainant will be her only chance or only break in her life and if I send the accused to prison then I deprive her of this opportunity. In his pleading the accused said that it was an impulsive act and if I now look at it having happened already in 1997 and that the accused has conspicuously not committed such a misdemeanor again, it looks to me that he would not pose such a big threat to the community.⁴⁴²

⁴⁴² Sentencing transcripts in an unreported case (2005) on file with author.

7.2.4 Court Case Study Four (maintenance for child conceived due to rape)

In this 2005 case, compensation was provided by way of a Court supervised civil undertaking, to assist with maintenance for the baby conceived as a result of the assault. The concerns referred to in the preceding case study - regarding the absence of statutory compensation provisions which would result in penal sanctions if the offender defaulted - similarly apply to this matter. This absence once again results in discriminatory outcomes and bias is again suggested as a root cause for the omission of proper court oversight.

Furthermore, the issue of children conceived by way of rape, and their maintenance, is contentious. The subject does not fall squarely into one legal sphere as it touches upon family law, social welfare provisions, child protection, and finally, criminal law (both from a sentencing perspective when a child is born from rape and from a maintenance perspective when criminal sanctions are sought for those who do not abide by maintenance court orders). It also encompasses a wide financial commitment. As noted by L Van Zyl in the *Handbook of the South African Law of Maintenance*, 'maintenance is a wide concept embracing, amongst other things, the provision of food, housing, clothing, medical care, and, in respect of children, education.'⁴⁴³

Finally, the prosecutor who referred the author to this case confirmed:

'...there was a child involved because after the rape the victim got pregnant and she gave birth to a child so the court ordered that the accused must compensate the victim for the expenses and then the accused must make sure that on a monthly basis he maintains the child of the victim as part of a suspended sentence because the court has the choice rather to send the accused to prison but if the accused goes to prison he won't be able to compensate the victim as well as support the child... So he was given a suspended sentence on condition that he gets a job and compensates the complainant and he takes care of the child.'⁴⁴⁴

⁴⁴³ Van Zyl (2005).

⁴⁴⁴ Defense Lawyer Interview in Cape Town's Sexual Offences Courts (2006) transcription on file with author.

7.2.5 Court Case Study Five (compensation from employers)

In this 2005 matter, the complainant initiated a criminal prosecution for indecent assault resulting from a workplace sexual harassment incident. The complainant also was an applicant in civil labor proceedings, for constructive dismissal, at the Commission for Conciliation, Mediation and Arbitration (the CCMA), where she was pursuing civil compensation remedies. This case reveals the difficulties sexual violence victims face in criminal proceedings when they seek other civil compensatory avenues alongside criminal prosecutions. In this regard, her CCMA efforts were classified as an ulterior motive for bringing the criminal complaint rather than an effort to attend to post-assault financial concerns. The approach of the magistrate can therefore be said to be discriminatory as biases were at play which suggested that the compensatory concerns of sexual violence victims should be put on hold until criminal matters were finalized despite pressing post assault financial obligations.

It must be noted that the agency⁴⁴⁵ of the complainant was clearly demonstrated in this case by her use of multiple legal forums, as she made a strategic legal decision to pursue multiple legal remedies. Her agency was nevertheless hampered by structural and legal blockages that existed in this case, in part regarding the melding of civil and criminal processes. More specifically, a review of the case file made it clear that the motive of the complainant, regarding compensation, became a concern of the court and this was partly responsible for the finding of innocence of the alleged offender. In this regard, in the sentencing judgment the magistrate noted that:

‘...cross examination highlighted [that] the complainant had a similar Labour Court matter in respect of a constructive dismissal against a previous employer [in addition to the Labour case pending now, regarding the subject matter of the criminal court case before us].’⁴⁴⁶

R Le Roux, T Orleyn and A Rycroft confirm the ‘awkwardness of a [coinciding] civil process having to decide if a criminal act took place... [because] the ‘balance of

⁴⁴⁵ See subsection 6.1.3 regarding agency.

⁴⁴⁶ Sentencing transcripts in an unreported case (2006) on file with author.

probabilities' test may result in a different conclusion to the 'beyond all reasonable doubt test.'⁴⁴⁷

In this regard Le Roux et al note the following:

'One preliminary observation must be about the different standards of proof in a criminal trial as opposed to a civil trial or workplace disciplinary enquiry. In a criminal trial the State is obliged to prove the elements of the crime 'beyond reasonable doubt'. Practically this means that as long as the defence can throw doubt onto the State's case, the court must find the accused 'not guilty'. In civil trials, the CCMA and internal disciplinary hearings the test used is the 'balance of probabilities' test, requiring the adjudicator, or arbitrator to weigh up all the evidence and to decide which version is most probable. This test allows for some doubt or even contradiction in evidence. A consequence of these different tests is that a person might be found in a disciplinary enquiry, on a balance of probabilities, to have sexually harassed the complainant, but to be found not guilty in a criminal trial because there was an element of doubt.'⁴⁴⁸

Furthermore, Advocate Lindy Saunderson, a State Advocate in the Sexual Offences and Community Affairs Unit of the National Prosecuting Authority confirmed the following:

'Crimes that can be committed by a sexual harasser include: rape, indecent assault, assault with the intent to do grievous bodily harm, common assault, *crimen injuria*, violation of a Protection Order in terms of the Domestic Violence Act and in its most serious form, murder, This is not an exhaustive list and prosecutors should always peruse cases thoroughly, as a history of sexual harassment will serve as an aggravating factor during bail applications as well as sentencing.'⁴⁴⁹

The above review, in addition to pinpointing biases, also confirms that complainants should use their agency when deciding if they wish to be a complainant in a criminal proceeding and when deciding when to bring civil legal proceedings while being cognizant of limitation periods, freshness of evidence and other tactical concerns surrounding criminal investigations and trials.

⁴⁴⁷ Le Roux, Orleyn and Rycroft (2005: 128).

⁴⁴⁸ Le Roux, Orleyn and Rycroft (2005: 127).

⁴⁴⁹ Saunderson (2003: 35).

7.2.6 Court Case Study Six (civil forfeiture and executable assets)

Before reviewing this Case Study it is important to note that subsection 5.2 contains a review of the civil forfeiture legal framework and Appendix 2 contains relevant documents regarding this Case Study. Also in the methodology subsection, in chapter 1.4 a detailed review of the action research practices that were employed in this Case Study are also fully examined.

This Case Study sought to identify institutionalized gender biases in relation to the provision of compensation to victims of sexual violence in civil forfeiture matters in South Africa. This issue was selectively focused upon, as biased decision making can lead to discriminatory outcomes and this can violate victims' constitutional rights in relation to equality, non-discrimination and security of persons (as outlined in Chapter Two).

The background facts of the case reveal that the alleged offender was accused of having sex with numerous under-aged children from a poor area outside of Cape Town. He absconded to Germany before the South African police could arrest him for questioning and in his absence the police issued a warrant for his arrest and the NPA initiated civil forfeiture proceedings under POCA to forfeit the house and car, wherein he allegedly victimized the complainants, as suspected instrumentalities of crime. Forfeiture proceedings were undertaken as they do not require a conviction and due to the fact that the alleged offender had already absconded from South Africa. Furthermore, A SAPS police investigator confirmed in Affidavit evidence filed for the Preservation Application, that there were outstanding allegations of police corruption in this matter, as officers were provided with bribes when they became aware of the ongoing alleged sexual crimes and this corruption allowed the alleged offender to abscond from South Africa before being apprehended. ⁴⁵⁰

⁴⁵⁰ Affidavit of an inspector in the South African Police Services, filed in The National Director of Public Prosecutions and Werner Braun, Villabraun (PTY) LTD (High Court of South Africa – Cape of Good Hope Provincial Division) on file with the author.

In this case, the NPA originally confirmed in writing that they could not assist sexually abused, minor complainants with their pecuniary rights, in civil forfeiture proceedings, while at the same time the NPA confirmed that commercial crime victims could be afforded prosecutorial assistance in relation to their financial concerns in the POCA regime. The NPA did eventually change its policy position on this issue in a response to a Law Society complaint that was initiated by the author, against the State Attorney, who was taking instructions from the NPA. More specifically, the NPA, while forfeiture proceedings were underway for the house and car, confirmed on record, in the Law Society proceedings, that they would hold the house and car in escrow, for the minor complainants, should these victims subsequently obtain a civil court judgment, and should the house and car be ordered forfeited to the State. The NPA thus acknowledged that they could assist victims of sexual assault with the realization, or execution, of civil damage awards upon a successful forfeiture judgment and if other conditions were met.

With regard to the final disposition of the case, the High Court granted an initial preservation order for the alleged offender's house, but did not grant the final forfeiture for the house thereby returning full title to the alleged pedophile's company.⁴⁵¹

Conversely, the car was subject to Supreme Court of Appeal litigation regarding the initial preservation application and a settlement was reached whereby the car was forfeited to the State, on a without costs basis.

⁴⁵¹ On 19 March 2009, Judge Z F Joubert, pronounced judgment on the preserved house. The judgment confirmed that the AFU final forfeiture application failed due to the following: "the property had little or no connection with Braun's extensive sexual relations with the young girls [as] many, if not the majority of the crimes took place elsewhere, many in public places [and therefore] the property was not an "instrumentally" in the commission of the offences"; and if the aforementioned factual finding is incorrect then "having regard to the limited number of offences which occurred on the property... a forfeiture would be disproportionate." Furthermore, the alleged offender's affidavit evidence, which purported that only a limited number of assaults took place in the house, was not "rejected" by the AFU advocate, Mr. Schippers and therefore "Braun's version that he had sex with only two of the complainants at the property has to be accepted for the purposes of this application."

There were three direct parties involved in this case:

- The State as represented by the NPA's Asset Forfeiture Unit (AFU). By way of background the AFU, characterizes itself as 'specialist litigation unit' within the Government which undertakes confiscation and forfeitures, with the goal of procuring proceeds and properties for the Criminal Asset Recovery Account (CARA), an account in the State's General Revenue Fund;⁴⁵²
- The property itself, namely the house and car, as these proceedings were undertaken *in rem* and were brought directly against the instruments of crime;⁴⁵³
- Finally, the alleged offender, in his capacity as a director and shareholder of the house, and the owner of the automobile.

Further, it is important to note that the Centre for Child Law, after the author brought this matter to their attention, provided the author with an informal undertaking that they would directly assist the child complainants in this matter. In this regard, the CCL advised the author that they would do so by locating the child complainants, with the assistance of a social worker, and thereafter assess their civil quantum. Unfortunately, the organization changed their position when they were subsequently admitted as an *amicus* in the proceedings. In this regard, they focused their *amicus* submissions on the importance of using alternative law enforcement techniques to deal with sexual violence and the benefits that would accrue to victims' organizations if CARA funds are distributed to civil society organizations.

As noted at the start of this subsection action research was employed. In respect of the within matter, the author became aware of the case by way of newspaper reports and thereafter he began attending the court proceedings. By attending court proceedings the author also became aware that the compensation rights of the complainant, children

⁴⁵² 2007/09 NPA Annual Report at 40.

⁴⁵³ Civil forfeiture applications have unusual pleadings as parties can include real property as opposed to individuals. In this regard, note the following title of proceedings as found in a journal: Gallant, Michelle (2006) 'Ontario (Attorney General) v. \$29, 020 in Canadian Currency: a comment on proceeds of crime and provincial forfeiture laws'

were not being addressed by the AFU. Accordingly, the author wrote to the NPA voicing his concerns about the neglect of the affected children's pecuniary rights (and neglect of children's rights in general), even though he was not a party to the proceedings, nor a person with a direct interest in the matter as he had not contacted the complainant children or their guardians. Thereafter, the AFU confirmed to the author, in writing, that the NPA was not obligated to bring the minor complainants' concerns to the court by way of a request for a *curator ad litem* report ⁴⁵⁴, and they were also not obligated to assist the minor complainants in obtaining legal counsel and standing in the said forfeiture proceedings.

In light of the above facts the author decided to incorporate this matter into his thesis as a case study in order to examine the gender biases that were encountered. In this regard, it was necessary to address the aforementioned institutional reluctance of the AFU as it had a long standing pattern of neglect regarding the pecuniary rights of sexual violence victims in forfeiture applications. More specifically, as their stated practice confirmed, the AFU had historically taken the position that it could not assist sexually abused minor complainants in forfeiture processes, such as those victimized in brothels

⁴⁵⁴ An order below, which is roughly based on a court file precedent, would have been helpful in the present case:

In the High Court of South Africa (Cape of Good Hope Provincial Division)

Curator Ad Litem Report: Re Appointment of Curator Bonis.

- 1.1 The undersigned, is appointed as *curator ad litem* for the complainants in terms of an order of the above Honourable Court. The order provides that the appointed *curator ad litem* is appointed to:
- 1.2 Report back to the above Honourable Court whether it is necessary for him or any other duly qualified *curator ad litem* to be appointed to the complainants to do all things necessary on the complainants behalf in pursuing a claim for damages against the alleged offender, including settle or compromise such a claim, emanating from injuries sustained.
- 1.3 Report back to this Honourable court whether it is necessary for a *curator bonis* to be appointed , after obtaining expert reports on the damages the complainants sustained as a result of delicts committed against them.
- 1.4 Specifically obtain a clinical evaluation of the complainants to determine whether they require a *curator ad litem* in light of their socio-economic background, psychological makeup, the ability of the minors to understand litigation and give instructions to an attorney.
- 1.5 The Costs of the Application and the Expert Reports are to be facilitated by the National Prosecuting Authority in the same manner as payments, expenses and obligations in relation to the upkeep of the property while under a preservation order.

when the said brothels were forfeited to the State.⁴⁵⁵ Therefore, the author sought to ascertain if this institutional blockage was occurring partly on account of biases.

While trying to ascertain if biases were partly responsible for differential treatment of victims within NPA policy the author identified three (3) incorrect presumptions put forth by the AFU as justification for their inaction and neglect of the sexual violence victims. The author was able to rebut these presumptions by way of legal arguments in a Cape Law Society complaint which allowed for direct and lengthy submissions to be made by the author and the AFU.

The first unfounded presumption put forth by the AFU was that 'proceeds of crime', which are seized under a separate post-conviction 'confiscation' POCA scheme, have unique characteristics that allow for victim participation, as opposed to victims harmed by 'instruments of crime,' who are dealt with under the POCA 'forfeiture' regime that is not dependent on convictions. In this regard, although there are differences in processes these procedural subtleties should not affect the substantive rights of victims of sexual violence as all complainant claims' for compensation from assets seized by the state, within the POCA regime, derive from civil law - be it delict, contract or fraud - irrespective of the type of illicit criminal derivative.

Furthermore, victims are provided with unique non-party status in both types of proceedings if they assert an interest in the instruments or proceeds sequestered. In this regard, victim standing is included in both POCA schemes as seized funds are handed over to the government if victims are not first located.⁴⁵⁶ Therefore, in both

⁴⁵⁵ See *National Director of Public Prosecutions v Geysers* (160/2007) [2008] ZASCA 15 (25 March 2008) for an example of a successful forfeiture of a brothel building. Also note the following quote from Gould's 2008 report (produced in conjunction with the Sex Worker Education and Advocacy Taskforce (SWEAT)): 'we only encountered five sex workers under the age of 18 during the course of our research, all who were selling sex on the street. None were being forced by an adult to do so, but they were rather forced by circumstances, including dysfunctional families and poverty.' (Gould 2008). Although small in number it is clear that there are cases of child prostitution and children are forced to work in brothels as prostitutes.

⁴⁵⁶ National Prosecuting Authority *Quarterly Performance Overview Report of Public Prosecutions – Quarter 2 – 2011/12* at 29 where it is confirmed that the NPA benchmarks its performance regarding compensatory 'orders in terms of POCA where a person has suffered damage to or loss of property or

schemes, the legislature wanted to ensure that victims could assert a priority claim, in relation to proceeds and instruments used in their victimizations. This issue was fully canvassed in subsection 1.1 when the theory behind the compensatory provisions of POCA was reviewed.

It is important to note that other jurisdictions, for example the Ontario regime in Canada, also ensure that victims have priority access to state compensation on account of being victimized by instruments seized by the government. Victims in Ontario are provided with direct access to funds in a special account (similar to Criminal Asset Recovery Account but constituted solely from instrumentalities) on the basis that they could lay claim to instruments employed in their abuse in the normal course of civil litigation. In this regard M Gallant confirms the following:

‘The Ontario law does derogate from any civil actions that might arise from the unlawful activity that underlies the forfeiture. The public action complements, rather than trumps, existing private legal entitlements such as the right of an individual victim to seek a remedy from a criminal defendant. Structurally however, the public regime reduces the interest in private law enforcement since a victim can apply for compensation from the pooled forfeited funds. Why expend efforts in inviting the complexities of a civil trial when the private action can simply await the outcome of the public action and then apply for compensation from the fund? This complementary relationship between the public law forfeiture action and the private rights of the victim of crime reveals the principle practical justification for the public regime. The victims of crime rarely attempt to impose civil liability on criminal defendants. Victims do not have the power to bring forfeiture actions, though they can use civil proceedings to impose civil liability, conventionally tort-based liability, on criminal defendants. The usually remedy, an award for damages, takes a bite out of an individual’s criminal earnings. But such actions are rare. On the one hand, the scarcity reflects the financial exigencies of civil trials, together with the problem of establishing causality.’⁴⁵⁷

By way of background, section 8(2) of Ontario Regulation 498/06 ‘Payments Out of Special Purpose Accounts’, prescribes that ‘a direct victim claimant is eligible for

injury as a result of an offence or related criminal activity (sec 30 of POCA) or the exclusion of property from a forfeiture order to pay a victim (sec 52 of POCA).’

⁴⁵⁷ Gallant (2007: 69-70).

compensation from the special purpose account if... the adjudicator is satisfied... that, (a) the claimant suffered pecuniary or non-pecuniary losses as a result of the unlawful activity; (b) the amount of the losses can be quantified.⁴⁵⁸ In addition, Howard Miller, Counsel of the Ontario Civil Remedies for Illicit Activities Office, Legal Services Division, Ministry of the Attorney General, Province of Ontario confirmed to the author via correspondence dated 6 February 2009, in reply to a statutory request for government information, the following, as it relates to the administrative and regulatory framework for the vetting of victim compensation requests in that jurisdiction:

'Under section 4(1) of Ontario Regulation [4]98/06, the Lieutenant Governor in Council can appoint one or more persons to act as adjudicator of the claims made by direct private or direct public victims for compensation. There is currently one adjudicator so appointed and she is cross appointed to the Ontario Assessment Review Board which allows for CRIA to utilize the services of an experienced adjudicator for the purposes of the Civil remedies Act. As well, the Attorney General may assign one or more employees of the Ministry to assist the adjudicator in carrying out his or her duties under this regulation. I have been assigned to carry out that function. The process to 'invite' victims of the specific unlawful activity starts within three months after the last deposit of money into a special purpose account. There is a statutory required notice to be posted in The Ontario Gazette advising victims that they have 90 days from the date of filing to submit claims for compensation... Notwithstanding that the publication of the notice in The Ontario Gazette is the only required method of notice to possible victims, the regulation also provides for a discretionary notice by any other way or ways that, in the opinion of the Director of Asset Management-Civil, will bring the right to make a claim for compensation to the attention of the direct private victims of the unlawful activity to which the forfeiture relates. I can indicate to you that as a matter of policy, we in all cases attempt to ensure that any know or potential victims that might be able to obtain compensation are notified directly or by other direct means other than the Ontario Gazette. Once the time period for filing claims has passed the adjudicator reviews the claim, seeks clarification or additional information of the claim and then provides their finding both as to whether or not the claim is acceptable and the amount of the claim that is approved. If the claim is not approved the claimant is also advised of this fact. That decision is final and not subject to appeal or set aside on judicial review unless the decision is patently unreasonable. To date, no decisions of the adjudicator have been altered or set aside, nor any proceedings to do so ever been commenced.⁴⁵⁹

⁴⁵⁸ Ontario Regulation 498/06 'Payments Out of Special Purpose Accounts' section 8(2).

⁴⁵⁹ Correspondence from Howard Miller, Counsel from the Ontario Civil Remedies for Illicit Activities Office, Legal Services Division, Ministry of the Attorney General, Province of Ontario (6 February 2009), on file with author.

The second unfounded presumption put forth by the AFU, with regard to their refusal to safeguard the pecuniary interests of victims of sexual violence in forfeiture proceedings, concerns the issue of quantifying the losses of sexual assault victims. More specifically, the AFU claims that sexual violence victims' damages are difficult to ascertain and therefore the rights of victims of sexual crimes cannot be directly addressed in forfeiture proceedings, thus sidestepping the fact that victims of sexual violence regularly issue civil pleadings, with quantifiable claims, albeit with the aid of expert reports. Also, as discussed in Chapter Eight, victim surveys illustrate that victims of sexual violence often have quantifiable losses in addition to pain and suffering damages. With this in mind, the calculation of many types of special damages incurred by victims of sexual violence, including lost school fees, emergency housing costs and termination of pregnancy expenses to name a few, are easily calculated, without the need for expert reports or actuarial verification. The author suggests that these types of expenses could easily be assessed and facilitated within forfeiture proceedings.

Finally, the third presumption that the AFU put forth was an illogical suggestion that commercial crime victims should be entitled to prosecutorial assistance in informal settlement processes, in relation to proceeds of crime, without requiring ancillary civil pleadings and/or civil judgments, yet these informal settlement processes were not applicable to victims of sexual violence, in relation to instrumentalities used in their victimization. In this regard, the unreported POCA order in *The State and Hoosain Mohamed*, Case 35259/03 Cape High Court, which involved the embezzlement of Road Accident Fund moneys, indicates that the AFU indeed has flexibility with regards to settlements and draft court orders put before judges for endorsement. More specifically, in the *Mohamed* case, in the 'Order in Terms of Section 18 of the POCA of 1998', the AFU obtained the following Court endorsement relief, after a criminal plea agreement was reached:

'victims who are party to the High Court action... [will be] a first charge... the balance of the victims... will be paid by the *curator bonis* upon adequate proof to him by these victims of the amounts owing to them... in the event of an excess in funds in the *curator bonis*' account after diligent effort to trace the victims,

such excess shall be paid into the Criminal Asset Recovery Account established in terms of section 63 of the [POCA] Act.’⁴⁶⁰

It is clear that the above court order did not require future un-identified victims to issue civil pleadings to obtain prosecutorial or *curator bonis* assistance but rather that these possible beneficiaries simply would need to assert a claim for compensation from the proceeds of crime once identified. Furthermore, to obtain greater insight into the *Mohamed* case POCA order, it is helpful to review a letter from Michael Murphy, the lawyer who represented the ‘overwhelming majority of the victims’ in that case, dated 28 October 2003, addressed to the NPA. This letter, as found in the public court file, was prepared at the request of the NPA’s Directorate of Special Operations so the AFU unit could have victim input regarding the proposed plea arrangement, and the ancillary POCA order, prior to presenting it to ‘the learned Judge who will consider the matter... [before it is] made an Order of Court.’

The following is noteworthy:

‘While, in theory, the civil proceedings could have continued despite the criminal [prosecution], for practical reasons not least that we have never enjoyed ongoing financial support necessary to attend to all of this and the vast majority of the work has been done without charging, it was agreed... that we would continue to join victims but not take any further steps in the proceedings while we awaited the outcome of the criminal proceedings. It was always contemplated and agreed that the victims would be paid as part of any plea arrangements in the criminal proceedings if this came to pass.’

....From the outset the attitude of the victims to the criminal proceedings has been that the State’s main objective [in the POCA process] should be to assist them to gain access to moneys... while I understand that there are other concerns that you have to take into account I share my clients views for a range of reasons... [namely, that the offenders] have [already] been ostracized... [and already] severely punished [by being subjected to a criminal prosecution].

....The civil action has of course not been settled and if monies are not recovered there remains the possibility of recovery via that route although at this late stage and in light of the agreement I have referred to [above]

⁴⁶⁰ Unreported case of *State and Hoosain Mohamed*, Case 35259/03 Cape High Court.

and the plea agreement itself and the duties it imposes this would appear to be unnecessary.’⁴⁶¹

The above correspondence provides a unique observation into the informal and discretionary POCA negotiation process and clearly demonstrates that victims can easily be assisted by the AFU, via settlement processes, regardless of the attainment of a civil judgment, and even without the issuing of pleadings.

This thesis therefore suggests that victims of sexual abuse also deserve the same assistance from the AFU as that which was previously provided to the victims in the *Mohamed* commercial fraud matter, and to do otherwise on account of biases results in discriminatory outcomes. In this regard this thesis suggests that the victims in this case study were not assisted party due to gender biases (as defined in subsection 1.2) for the below reasons.

First, the NPA had a long-standing policy of refusing to assist victims of sexual violence, who are mostly women and children, in POCA proceedings while they conversely provided regular informal and formal assistance to commercial crime victims.⁴⁶² Also note that the NPA proviso that the victims in this case study must first obtain an ancillary civil judgment, before prosecutorial assistance can be arranged, must be seriously questioned in light of the assistance that was provided to the victims in the *State and Hoosain Mohamed* fraud case, as previously referred to in this case study.

Second, the NPA eventually confirmed that they could assist the sexual violence complainants in the case study thus confirming they had the discretionary authority to

⁴⁶¹ Attorney Michael Murphy’s letter to NPA’s Directorate of Special Operations (28 October 2003) on file with author.

⁴⁶² For example forfeiture provisions are often used to seize brothels wherein minor prostitutes are located. In this regard, see National Director of Public Prosecutions v Geyser (160/2007) [2008] ZASCA 15 (25 March 2008). Also note Gould (2008: 23) reporting that researchers ‘encountered five sex workers under the age of 18 during the course of our research’ and ‘none were being forced by an adult to do so, but they were rather forced by circumstances, including dysfunctional families and poverty.’

Furthermore with regards to the formal and informal assistance provided to commercial crime victims in POCA proceedings note the unreported Cape High Court decision of *State v Hoosain Mohamed Case Number 35259/03*, as found in this case study.

intervene at first instance but refused to exercise their discretion. This thesis suggests that one of the reasons their discretion was not employed at first instance was on account of biases. More specifically the NPA suggested that victims of sexual violence did not have quantifiable losses and the injuries of the children in question did not require extensive professional interventions (perhaps because many of the children were paid nominal amounts of money and consent was therefore implied). More specifically, the Founding Affidavit of the Deputy Director of Public Prosecutions⁴⁶³ (which was commissioned for the final settlement for the forfeiture of a car wherein sexual violence occurred) confirmed that “police officers investigating the criminal matter have traced 8 girls who alleged they were paid money to have carnal intercourse and/or perform immoral or indecent act with Braun, whilst they were under age 16...[and] the children involved are all from poverty stricken families and live in small, overcrowded dwellings... [and some] are pupils.”⁴⁶⁴ Despite the vulnerabilities of the victims and the quantifiable losses they might have sustained as result of school interruptions, and counseling and health care, the NPA confirmed that, although in the past they had “made arrangements with victims who have suffered financial loss as a result of criminal activity to achieve some compensation for victims, however these cases are limited to situations where the loss is reasonably quantifiable...[and] it is unfortunately the view of the NPA that we are not in a position to pursue compensation for [the] victims.”⁴⁶⁵

Taking note of the above two facts, it is reasonable to assert that gender bias was partly responsible for the absence of pro-active prosecutorial assistance especially so when the NPA POCA compensation targets are of particular importance to the Government.

⁴⁶⁶ Furthermore it can be said that when biases contribute to a prejudicial outcome,

⁴⁶³ Founding Affidavit of the Deputy Director of Public Prosecutions Jacobus Abraham Niehaus, in NDPP and Werner Braun (In re: A silver BMW) (30 April 2010) High Court of South Africa (Western Cape High Court, Cape Town) Case Number 9313/10.

⁴⁶⁴ Ibid paragraphs 35 and 36.

⁴⁶⁵ National Prosecuting Authority, Asset Forfeiture Unit, correspondence to Bryant Greenbaum (16 August 2006) on file with author. See letter in Appendix 3.

⁴⁶⁶ National Prosecuting Authority *Quarterly Performance Overview Report of Public Prosecutions – Quarter 2 – 2011/12* at 29 where it is confirmed that the NPA benchmarks its performance regarding

even though other contributory influences may exist, that a discriminatory outcomes occurs.

With this in mind, in subsection 1.2 gender bias was defined as a process in which irrational stereotypes and unfounded prejudicial assumptions are used by state officials and state institutions to justify either preferential treatment for certain classes of victims (for example commercial crime victims as compared to sexual violence victims), or alternatively, to justify the lack of prosecutorial and court services available to female victims. Furthermore gender discrimination was defined as the unnecessary aggravation of female vulnerabilities, by state role-players when they improperly address gender differentiations. Applying these definitions to the case study at hand it can be stated that the NPA discriminated against the victims of sexual violence as they did not receive the same compensatory assistance as commercial crime victims, partially on account of misconceptions, and this aggravated their vulnerabilities because if compensation was awarded they could better attend to their post assault recoveries and concerns.

compensatory 'orders in terms of POCA where a person has suffered damage to or loss of property or injury as a result of an offence or related criminal activity (sec 30 of POCA) or the exclusion of property from a forfeiture order to pay a victim (sec 52 of POCA).'

7.2.7 Court Case Study Seven (car registration as compensation)

This case is helpful as it demonstrates the adaptability and flexibility of CPA compensation orders in criminal proceedings when violent crime is involved. This furthers the argument in relation to bias because it clearly shows that compensatory provisions are available and could be adaptable in sexual violence cases but as noted in interview, case study and survey data in Part Five they are infrequently used.

In this case the offender was convicted of robbery and assault and compensation was provided by way of a partly suspended sentence, in combination with imprisonment. More specifically, a company was robbed of R19 700.00 when its factory manager was held up at gunpoint. The prosecutor in this case arranged the transfer of a car registration document to the victim for compensatory purposes, in lieu of a cash payment, after police ensured the car registration was in order. This precedent could also be applied to sexual violence cases, to effect compensation where an offender is unemployed but has a real property, to assist with complainant compensation.

With regard to minimum sentences, details in the plea and sentence agreement between the prosecutor and the offender, in addition to comments from the prosecutor interview, confirmed the following:

[105A Agreement] 'The substantial and compelling circumstances in terms of section 51(3)(a) of the Criminal Law Amendment Act, No105 of 1997, which justify a sentence less than the prescribed minimum sentence are as follows: (a) Even though the complainant was pushed by the accused, he sustained no physical injuries; (b) The accused is HIV positive; (c) The accused has shown genuine remorse and is eager to compensate the complainant (d) The accused himself did not wield the firearm; (e) The accused was not aware that his co-perpetrator has a firearm.'⁴⁶⁷

[Prosecutor] 'Fifteen years imprisonment, of which three years imprisonment was suspended for five years and that means he got seven years and he got compensation which is little compared to the minimum sentence which requires 15 years.'⁴⁶⁸

⁴⁶⁷ 105A Agreement in an unreported case (2005) on file with author.

⁴⁶⁸ Prosecutor Interview in Cape Town's Sexual Offences Court (2006) transcription on file with author.

Also, the prosecutor confirmed that the following ad hoc quantification processes and informal procedures were employed to satisfy the criminal sentencing compensation order, in an informal interview:

'We discussed the plea bargaining with the witnesses, which is a requirement, we have to do that, and they were very happy with that [and] I phoned the owner of the company and they were interested in getting their money back...I mean the witnesses who had to come here and testify. They came here several times and they got tired of coming to court. All that they wanted was the matter behind them and as long as the accused got his jail time and they got some money back they were happy... The [defense] attorney came to me and he said: 'look, you have a strong case against my client but to be honest with you he is dying [as he has HIV]'... so I went back to the complainant and I told him, look, what can we do... can I request that he pay you back money?... they said yes that is fine and that is how we negotiated for seven years.... It was my idea about the money [as] I felt that seven years was little and I wanted something more out of it [so] that is why I suggested giving money and yes the attorney agreed to it and then that is where he mentioned the car and we decided we were going to do it that way... I had contacted the police to do a license check and everything based on that for me. We didn't do the agreement the same day. We postponed it so that everything can be sorted out and we know that it was a valid car that belongs to him. So the police have done that for me. They checked and they got the registration from me and everything to make sure that it's legal.'⁴⁶⁹

⁴⁶⁹ Prosecutor interview in Cape Town's **Commercial** Crime Court (2006) transcription on file with author.

7.2.8 Court Case Study Eight (house bond as compensation)

This case is helpful as it demonstrates the adaptability and flexibility of CPA compensation orders in criminal proceedings when violent crime is involved. This furthers the argument in relation to bias because it clearly shows that compensatory provisions are available and could be adaptable in sexual violence cases but as noted in interview, case study and survey data in Part Five they are infrequently used.

In this case compensation of R60 000.00 was provided by way of a completely suspended sentence for this attempted murder matter involving serious complainant gunshot injuries. This matter demonstrates the flexibility of CPA compensation provisions in violent crime matters.

The High Court, on appeal, rejected the original mandatory minimum jail sentence imposed by the trial magistrate and remitted the matter back to trial so that the magistrate could award victim compensation, alongside a completely suspended sentence. Furthermore to ensure compensation was provided to the victim the following court sanctioned processes or conditions occurred:

- First, the court was aware that the offender required money from family members to effect the compensation order. In this regard in a Cape Argus newspaper article it was noted that '[the offender] said his elderly mother had lent him most of the R68 000 [to offer the victim] and because he could not afford to repay her as much as she should each month she was also battling'; ⁴⁷⁰
- Second, quantification was done on an ad hoc basis. In this regard, in the court transcripts, the social worker who compiled the VIR confirmed that: 'it was felt that the amount of R50 000 was mentioned, and basically the feeling is that that would, at this stage, just cover what remains of the outstanding bond as they had to borrow money to pay their rates, that's in arrears, and they have to pay back

⁴⁷⁰ Cape Argus Newspaper/Helen Bamford 'Struggle to pay back victim' (27 July 2008) at 12.

the loans that they've incurred because of that.'⁴⁷¹ Also, during the defense cross examination of this social worker the following was noted: 'you haven't drawn up an actuarial report, a person specifically assigned to work out all the pro's and con's and then come up with an amount [but your opinion will suffice]';⁴⁷²

- Third, interventions by the prosecutors and magistrate helped facilitate the compensation order. In this regard, the magistrate directed the defense and prosecution to: 'get together and work out an amount... and consult with the complainant to get the full story about the rates and the bond';⁴⁷³
- Fourth, regarding the substantial and compelling circumstances that accounted for the departure from the minimum sentences requirements, it was noted by the defense lawyer, at the sentencing proceedings that 'I am going to look at the totality, he is relatively young, first offender, this was not planned and pre-meditated, it happened on the spur of the moment under circumstances where the accused was intoxicated.... And he has R80 000, so he can, if the Court allows him or affords him the opportunity he will pay off the bond of the victims.'

With the above contingencies in mind, this case clearly shows the adaptability and flexibility of compensation orders in criminal proceedings irrespective if the crime is subject to minimum sentencing reviews and if the offender must obtain funds from other family members.

⁴⁷¹ Court Transcripts in unreported case 34/11/04 in the Regional Court of Cape Town (2008) on file with author.

⁴⁷² Ibid.

⁴⁷³ Ibid.

7.2.9 Court Case Studies Conclusions

The Case Studies in this thesis sought to demonstrate two phenomena.

First, the wide applicability of CPA and POCA compensatory laws in violent crime matters in general and sexual violence matters in particular and the flexibility of these provisions in relation to minimum sentences, quantum, contribution sources and payment schedules/methods (as found in Case Studies One, Two, Six, Seven and Eight).

Secondly, patterns of biased decision making were also discerned in relation to the following types of cases: a criminal court case wherein customary compensation arrangements in a sexual violence matter were improperly handled (see Case Study Three), a criminal court case wherein the maintenance of a child conceived during rape was improperly canvassed (see Case Study Four), a criminal court case wherein irrelevant adverse inferences were noted by the magistrate when a victim of sexual violence sought compensation from an employer in ancillary civil proceedings (see Case Study Five) and finally in a civil forfeiture matter wherein the NPA did not ensure that the interests of victims of sexual violence were safeguarded (see Case Study Six).

With regards to the first phenomena the below conclusions can be put forth.

- The court case studies confirmed that unilateral compensation offers by offenders can constitute a substantial and compelling reason in which to depart from the minimum sentencing regime, so long as the complainant agrees to accept compensation and the offender is unlikely to commit further crime. In this regard, magistrates in Case Studies Two, Seven and Eight suggested that the offender's offer of compensation and the victims acceptance of this offer, constituted a paramount reason to deviate from minimum sentences. Moreover, it is important to note that the quasi-criminal forfeiture provisions noted in Case Study Six are not tied to criminal convictions so the minimum sentencing regime does not apply.

- The court case studies confirmed that prosecutors and magistrates can informally assist victims with their quantifiable and non-quantifiable losses and that CPA compensatory provisions are flexible and can easily be adapted for use in violent crime matters. In this regard, the following is noteworthy. In Case Study Three and Four prosecutors and magistrates facilitated compensation informally, without incorporating the compensation agreements into CPA sentences. More specifically in Case Study Three, which took place throughout 2005, R30 000 compensation was paid to a victim of sexual violence after customary negotiations took place between the prosecutor and the relatives of the complainant and the offender. Also, in Case Study Four, compensation was provided to a victim for the maintenance of an infant born after a rape. Furthermore there were examples where prosecutors and magistrates assisted victims to ensure compensation was provided while incorporating the compensatory agreements into CPA sentences. In this regard the following is noteworthy. In Case Study Eight, which took place throughout 2007, CPA compensation was arbitrarily set at the value of the complainant's bond on his residence, namely R60 000, and not actuarial evidence, after sustaining gunshot wounds in a violent crime matter which resulted in lost employment and difficulties making the said bond payments. Finally in Case Studies Two and Seven, respectively, CPA compensation were arranged by way of prosecutorial and judicial assistance in relation to future counseling expenses for a sexually abused child and in relation to the exchanging of car registrations papers in lieu of cash (which is in effect was a transfer of a title deed for real property).

Moving on to the second phenomena reviewed in the case studies, it is suggested that there were patterns of biased decision making in relation to the following types of cases:

- A criminal court case wherein customary compensation arrangements were improperly handled as the customary agreement was not incorporated into a CPA sentence so as to encourage compliance and to ensure payments were not subsumed by male figure heads. In this regard, in Case Study Three irrational

stereotypes and unfounded prejudicial assumptions were used by state officials to justify the lack of prosecutorial services available to this female sexual violence victim. Furthermore gender discrimination was evident as this unnecessarily aggravated the victims' vulnerabilities as gendered differentiations were not properly addressed (namely the disadvantages faced by this vulnerable female victim when she was forced to engage in patriarchal customary negotiations without proper prosecutorial oversight);

- A criminal court case wherein an agreement on compensation for a child conceived during rape was improperly handled. In this regard, the contributory agreement between the convicted offender and the victim was not incorporated into a CPA sentence so as to encourage compliance and to ensure payments would not be subsumed by male figure heads. In this regard, in Case Study Four irrational stereotypes and unfounded prejudicial assumptions were used by state officials to justify the lack of prosecutorial services available to this female sexual violence victim. Furthermore gender discrimination was evident as this unnecessarily aggravated the victims' vulnerabilities as gendered differentiations were not properly addressed (namely the disadvantages faced by this vulnerable female victim when she was forced into an informal contributory agreement, in relation to pregnancy and childcare costs, for a child conceived during a rape, without proper prosecutorial oversight);
- A criminal court case wherein an adverse inference were noted by the magistrate when a sexual violence victim sought civil compensation from an employer while also simultaneously engaging in a criminal process. In this regard, in Case Study Five irrational stereotypes and unfounded prejudicial assumptions were used by state officials to partly justify an acquittal of an accused. Furthermore gender discrimination was evident as this unnecessarily aggravated the victims' vulnerabilities as gendered differentiations were not properly addressed by the magistrate (namely the disadvantages faced by this vulnerable female victim

when she was forced to seek out civil remedies to attend to her urgent post assault economic losses while also wanting to pursue a criminal complaint);

- A civil forfeiture matter wherein the NPA did not ensure that the interests of victims of sexual violence were safeguarded. In this regard, in Case Study Six irrational stereotypes and unfounded prejudicial assumptions were used by state officials and state institutions to justify preferential treatment for certain classes of victims (namely commercial crime victims as compared to sexual violence victims) and to justify the lack of prosecutorial and court services available to the victims. Furthermore gender discrimination was evident as state officials unnecessarily aggravated the vulnerabilities of female victims by improperly addressing their gender differentiations. More specifically the NPA discriminated against the victims as they did not receive the same compensatory assistance as commercial crime victims, partially on account of misconceptions, and this aggravated their vulnerabilities because if compensation was awarded these victims could have meaningfully attended to their post assault recoveries and concerns.

Finally, as alluded to above, the case studies demonstrated that male violent crime victims were often provided with preferential prosecutorial and judicial assistance in comparison to female sexual violence victims. More specifically, violent crime victims in Case Studies Seven and Eight were provided with preferential treatment because their compensation orders were incorporated into CPA sentences thus providing a powerful incentive for compliance as defaults can result in penal sanctions. Conversely in some of the court case studies that involved victims of sexual violence disparities were evident regarding the need to back up compensatory agreements by way of CPA sentences. For example, in Case Study Three a victim did not have her customary agreement included in CPA provisions even though the prosecutor and magistrate used the agreement as a reason to reduce the offender's sentence, and in Case Study Four a victim did not have her pregnancy/maintenance costs incorporated into CPA provisions as the prosecutors and magistrate arranged for a less demanding civil undertaking

instead even though, once again, the prosecutor and magistrate used the agreement as a reason to reduce the offender's sentence.

7.3 Interview and Case Studies conclusions

Conclusions in this subsection are brief as the findings in the final subsections in the interview and case studies subsections (namely subsection 7.1.3 and subsection 7.2.9) review the final outcomes of these two original research sources. The brief conclusions are as follows:

- In subsection 7.1.3 it was concluded, **by way of twenty-seven (27) interviews with criminal justice role-players**, that victim compensation is rare in sexual violence cases and there are some misconceptions and biases evident in role-players' rationales in excluding victim compensation reviews in matters involving sexual violence. In addition, it was found that commercial crime victims were regularly assisted with their compensation concerns as opposed to victims of sexual violence, as the compensatory needs of these victims were ignored.
- In subsection 7.2.9, **upon review of eight (8) Court Case Studies**, it was concluded that minimum sentencing legislation is not necessarily a bar to victim compensation and that the courts can provide compensation to victims of sexual violence within the existing legislative and administrative regime. In addition, it was found that violent crime victims were properly assisted with their compensation concerns, as opposed to victims of sexual violence, as compensatory agreements between offenders and victims were often not incorporated into CPA sentences, and POCA orders, when sexual violence was involved. Biases were also cited as being partly responsible for this omission.

The above two research sources – interviews and case studies – therefore suggested that the compensation provisions in the CPA and POCA, and the SRDG and CWS benefits, were not being fully utilized when sexual violence was involved and institutional gender biases were partly influencing the scarce use of these important provisions. Furthermore, these sources confirm that bias was also partly preventing proper prosecutorial and judicial oversight of customary compensation arrangements that took place alongside criminal prosecutions.

-CHAPTER EIGHT-

A VICTIM SURVEY

8 Introduction

Gender violence research in South Africa suggests the importance of ascertaining women's subjective voices and viewpoints. For example, S Rasool et al, confirm the following priorities with regards to gender violence research and advocacy: firstly, research on 'violence against women is about the experience of the survivor - something which quantitative surveys are unable to capture';⁴⁷⁴ secondly, 'the experiences of women are more likely to be captured during interviews in which the power dynamics between the interview and the interviewee are minimized';⁴⁷⁵ and thirdly, it is important to highlight 'the subjective experience of the survivor and locate the survivor at the center of the research process rather than as a mere subject.'⁴⁷⁶

With the above priorities in mind, the author undertook to complement his examination of the compensation processes within the Western Cape criminal justice system, with the voices and viewpoints of female South African survivors of sexual violence by way of structured qualitative surveys/interviews.

In addition, the author compared these gendered voices and viewpoints with other literature and reports regarding the financial costs of sexual assault victimization. More specifically, the author compared the victim preferences ascertained in the survey with the costing assumptions/models put forth in the South African Law Reform Commission Discussion Paper, *Sentencing (A Compensation Scheme for Victims of Crime in South Africa)* (hereinafter referred to as the SALRC Discussion Paper)⁴⁷⁷ and with other academic literature. By way of background the SALRC Discussion Paper is of particular

⁴⁷⁴ Rasool et al (2002: 8).

⁴⁷⁵ Rasool et al (2002: 9).

⁴⁷⁶ Rasool et al (2002: 9).

⁴⁷⁷ South African Law Reform Commission (2001).

relevance as it is the only public report that comprehensively reviews special damages of South African sexual violence victims.

This Chapter, in the forthcoming subsections, will review four (4) main survey themes, in relation to victims of sexual violence and their compensatory concerns, namely:

- The overall categories of post-assault economic losses incurred by sexual violence victims and the absence of state and offender compensation;
- Gender, race, class and cultural barriers/concerns and sexual violence victims' post-assault economic losses;
- Sexual violence victims' post-assault economic losses in relation to their interactions with the criminal justice system;
- Complainant views on offender, and alleged offender, compensation.

8.1 Survey objectives and propositions

Direct information and viewpoints from female survivors of sexual violence was necessary in order to obtain clarity and elaboration on the following issues:

- To ascertain if sexual violence victims incur quantifiable 'economic losses'⁴⁷⁸ after sexual violence;
- To ascertain the general categories of economic loss sustained by sexual violence victims, including transportation, medical, telephone, property damages/loss, housing, security, employment, education, counseling and childcare costs. Note that pain and suffering or punitive damages were not reviewed in the author's qualitative survey of sexual violence survivors;
- To ascertain if unplanned economic losses obstructed sexual violence victims' recoveries or their access to court, while considering how gender intersects with practical issues⁴⁷⁹, class issues⁴⁸⁰, race issues⁴⁸¹, and cultural and community issues⁴⁸²;

⁴⁷⁸ Economic losses refers to past Rand expenditures, continuing Rand expenditures, future/expected Rand expenditures, bartered economic losses, losses relating to the depletion of limited employment and insurance benefits, or 'goodwill' economic losses. In this regard, 'goodwill' is usually limited as the participants may only be able to obtain informal assistance from neighbors, family, employers and the community up to a certain limit after which their requests for assistance will be considered excessive, repetitive or overly burdensome by these entities. Examples of goodwill economic losses include: services such as childcare and security assistance; monetary/debt relief; extended sick leaves or absences from work; provision of goods and food; and other limited assistance that translates into real economic value to these participants.

⁴⁷⁹ Practical issues were made apparent when survivors identified familial, monetary, geographic, transportation, disability and mobility barriers in relation to their victimization and/or engagement with the criminal justice system.

⁴⁸⁰ Class, as employed in the social sciences to denote economic social stratification in a given society, was determined by way of the survivor's comments relating to her employment status/occupation, financial standing and/or housing conditions. In this regard, Seekings and Natrass (2005: 237-8) confirm that class structures 'can be seen in simple gradational terms, according to income (or another material aspect of life)' or 'mapped according to the categories in which people put themselves [or define themselves]' or 'in terms of productive assets (for example, land, human capital, or education) or entitlements' or 'as a relational concept derived from the great German scholars, Karl Marx and Max Weber' that delineated the bourgeoisie owners of production from the proletariat workers.

- To ascertain the general pecuniary ability of offenders to compensate victims and victims preferences regarding offender compensation.

The survey research was premised on two propositions:

- If the sexual assault survivors who completed the survey could identify, and thereafter suggest an inclination for payment of economic losses, this would demonstrate that, in some cases, sexual assault survivors should be actively assisted with their requests for offender criminal compensation orders in sentencing hearings and forfeiture applications, or alternatively, be provided with access to government compensation, via the SRDG or CWS, if an offender is impecunious.
- If the gender, race, class and cultural characteristics of the survey participants, affected their access to compensation this would demonstrate that measures needed to be implemented within the criminal justice system to address these discriminatory blockages (while noting the definition of discrimination in subsection 1.2).

In concluding this introductory subsection it is also important to note that methodological considerations, in relation to survey administration, are found in subsection 1.4, and that detailed survey findings can be found in Appendix 3.

⁴⁸¹ Race was identified by way of the language in which the survey was completed, with isiXhosa almost exclusively spoken as a first language by Black South Africans in the Western Cape while Afrikaans and English is employed as a first language predominately by Coloured and White people in the Western Cape.

⁴⁸² Culture and Community issues were made apparent when survivors identified non-state justice forums, non-state cultural and community expectations and non-state forms of assistance to survivors.

8.2 Methodology: procedures, processes and limitations

It is first important to note that ethical issues in relation to survey design and administration are reviewed in subsection 1.4 ,in the methodology section at the start of this thesis.

With regards to practical issues, following approval from the University of Cape Town, Faculty of Law Ethics Committee ⁴⁸³, the author formulated and drafted a structured qualitative survey with informed consent information contained therein (a copy of the survey, is contained in Appendix 3). The survey's questionnaire was then modified, after testing by Rape Crisis counselors ⁴⁸⁴, to ensure that victim trauma or discomfort would be kept to a minimum. Thereafter, a final survey template was completed in English, isiXhosa and Afrikaans.

The survey was then administered under the author's direct supervision from April 2005 until February 2008 to forty-seven (47) female sexual assault survivors, or legal guardians of same (hereinafter referred to as the 'participants'), by trained Rape Crisis counselors, and on two (2) other occasions by a trained social worker and by a psychologist (hereinafter referred to as the 'counselors').

The counselors identified the participants at scheduled counseling or social work sessions required for therapeutic or court preparation purposes ⁴⁸⁵, or alternatively participants were identified by counselors at a post-rape medical/ legal clinic, called the Thuthuzela Care Centre (TCC) in Manenberg, Cape Town ⁴⁸⁶, when participants

⁴⁸³ The Ethics Committee's approvals were in accordance with the University of Cape Town's Code for Research Involving Human Subjects, found in the University of Cape Town's Research Handbook (March 2005) at 25-26. Approval of my methodologies was provided by way of an email dated 10 August 2005 from Wilfried Schärf.

⁴⁸⁴ Rape Crisis - Cape Town has been providing assistance to rape survivors in Cape Town for over 30 years. They undertake counseling, lobbying and advocacy work.

⁴⁸⁵ Court purposes include assisting participants with a victim impact statement for the sentencing of an offender and helping prepare victims/witnesses for court.

⁴⁸⁶ Thuthuzela Care Center is located in the GF Jooste Hospital in Manenberg, Cape Town and it was the first one-stop post-rape medical legal clinic organized in South Africa. The Thuthuzela Care Center assists sexual assault complainants with medical concerns, forensics and counseling matters.

attended the TCC for medical assistance after the initial sexual assault. Additionally, some participants approached counselors to participate in the survey after viewing signs advertising the survey in the waiting rooms of Rape Crisis offices.

With regard to survey completion, this took place after the above noted testing and identification period, when the participants attended for counseling/social work follow-up sessions, months or years after the assault, or alternatively, in the vast majority of cases, at a six-month, post-assault, research interview session at the TCC.

The majority of surveys were conducted in isiXhosa with counselors first reading and explaining survey questions in isiXhosa to the participants and thereafter writing down the participant's answers and comments in isiXhosa or in English. The survey was also completed in English and Afrikaans in the same manner with fewer English and Afrikaans first-language speakers availing themselves to the study.

To undertake the administration of the survey three research partnerships were formed. Firstly, a research contract was signed by the author with Rape Crisis and thereafter Rape Crisis assisted with the following tasks: it reviewed the initial draft survey with regards to content, language and format (including informed consent procedures); it reviewed the Afrikaans and isiXhosa language versions of the survey; and it provided access to counselors for survey training and administration. The Rape Crisis survey administration was integrated within a therapeutic counseling framework. With this in mind, surveys were completed to assist survivors with confronting their trauma so that pragmatic recovery strategies could thereafter follow, and secondarily for research and advocacy purposes.

Secondly, after modifying and perfecting the English, isiXhosa and Afrikaans translations, and the administrative protocols, an agreement was thereafter reached between the author and Anastasia Maw, Lecturer at the University of Cape Town's Department of Psychology, to administer the survey on participants in her doctoral research group at the TCC. Again, Rape Crisis trained counselors were employed and/or supervised by Maw when the survey was administered. In addition, Maw was reviewing post-traumatic stress occurrences in rape survivors that presented

themselves to the TCC. The survey was therefore incorporated into Maw's research schedule and survey training, while the monitoring and instruction was provided by the author. Maw's programme was administered for research purposes only, as opposed to the therapeutic counseling imperatives employed by Rape Crisis, although counseling referral information was incorporated into the process. With this in mind, each of Maw's participants received transportation costs and food vouchers for their participation in the interview process.

Thirdly, a social worker and a private psychologist whom the author met in the course of conducting this research also assisted with survey administration with their clients in clinical settings. However, after completing one survey each, both of these entities decided that they could no longer assist with the survey research because of organizational and capacity constraints.

The survey research had the following limitations:

- The survey employed qualitative measures only and guided discussions took place on all questions posed in the structured questionnaire. In this regard, the survey was not intended to establish incidence/prevalence rates of sexual violence or to quantify the average monetary losses of rape survivors in South Africa, pursuant to established accounting standards. Rather Rand approximations and economic loss information is provided to illuminate general patterns of losses while taking into consideration gender, race and class concerns;
- The research participants were not stratified across South Africa, the Western Cape or Cape Town and in addition all participants reported their abuse to either Rape Crisis counselors or to the government, via the coordinated TCC or the police. Therefore the survey does not contain the views and insights of a wide cross-section of women across the country, province or city nor does it incorporate voices of women who solely employed customary, community or

familial post-assault interventions and who did not report their assault to government authorities;

- Non-probability sampling methods were employed as the counselors identified research participants from their current client lists, responses to posters, or from persons who attended the TCC. Participants were therefore randomly selected from a limited pool;
- A small sample was undertaken for this survey, as only 47 participants were involved;
- Victims of sexual violence experience shame and guilt. Therefore the amount and specification of information obtained sexual violence victims may be limited. L Davis, M Du Plessis and H Klopper confirm the following: 'victims are often reluctant to disclose information, especially in the case of sexual offences' and 'apart from memory problems, factors such as shame, the stigma of being victimized, embarrassment and unwillingness to confide in a stranger make the reporting of victimization events difficult' ⁴⁸⁷;
- The participants' information was not verified with police records or with court records so it is unclear if and why (alleged) offenders were convicted of offences;
- The participants' information was not verified with receipts or economic loss documentation.

The foregoing limitations were mitigated using research techniques suggested by L Davis et al. in their article 'The Value of Qualitative Methodology in Criminological Research' ⁴⁸⁸ which retrospectively critiqued the research practices of a marital rapes study that employed a 'purposive theoretical sampling method... one-on-one, in-depth,

⁴⁸⁷ Davis, Du Plessis and Klopper (2005: 24).

⁴⁸⁸ Davis and Klopper (2003: 72).

semi-structured interviews... [and] open-ended questions.’⁴⁸⁹ The marital rapes study's goals, which were similar to the survey goals in this thesis, ‘...[were] to reduce... the experiences [of the marital rapes' survivors] to a brief description that typified the experiences of all the participants in the study.’⁴⁹⁰

To ensure that the qualitative data was reliable, the marital rapes study researchers, and the author of this thesis, were guided by similar research principles or guidelines. In this regard the methodological priorities in the marital rape study and the priorities of the research undertaken for this thesis are fully reviewed in the methodological review at the beginning of this thesis is subsection 1.4.

⁴⁸⁹ Davis and Klopper (2003: 73-74).

⁴⁹⁰ Davis and Klopper (2003: 74).

8.3 Participants' overall heads of damages

Of the forty-seven (47) participants who completed the survey, thirty-six (36) participants identified ⁴⁹¹ economic loss(es), with or without corresponding Rand expenditure figures, as a result of their (alleged) sexual violence. ⁴⁹²

Of those participants that noted estimated⁴⁹³ Rand expenditures (note that some participants did not provide Rand/monetary estimates):

- Thirteen (13) participants had estimated expenditures of under 100 Rands;
- Eleven (11) participants had estimated expenditures of between 100 Rands and 700 Rands;
- Six (6) participants had estimated expenditures of over 1000 Rands.

⁴⁹¹ Identification of economic losses occurred both when participants indicated that they did not want compensation from the offender but identified loss(es) and when participants indicated that they did want compensation and thereafter identified loss(es). Also, identification occurred when participants identified losses (with an inclination for or against compensation) and other sanctions for the perpetrator(s) such as vigilante beatings by the community or incarceration by the State.

Lack of identification of economic losses could have occurred because: participants did not have disposable incomes (in this regard a common response of participants was they did not pursue a government subsidized service because of prohibitive transportation costs that they could not afford); participants received government assistance by way of free services (directly provided by government or subsidized by the government and provided by other non-governmental entities) such as post-rape medical assistance at the TCC; participants received direct cash payment from the clerk of the court or a service provider for transportation costs or other expenses; participants were too traumatized to use their disposable incomes for their expenses after sexual violence; participants were prevented from using their disposable incomes due to external constraints and blockages (including cultural, class and race barriers); and participants did not wish to obtain assistance or purchase services and/or goods because they considered their injuries to be self-healing, they did not want to draw attention to their victimization and they did not have time to attend to their injuries due to childcare, household or employment obligations.

⁴⁹² The term (alleged) sexual violence is used as court records were not provided to confirm if criminal convictions were obtained.

⁴⁹³ Estimates of Rand expenditures were provided by participants in their survey responses without corresponding receipts or documentation verifying same. See above-noted limitations in Methodology section.

The following number of participants identified the below heads of damages, or types of economic loss(es), incurred as a result of the (alleged) sexual violence:

- Thirty-four (34) participants identified transportation economic losses;
- Twelve (12) participants identified medical/medications economic losses;
- Twelve (12) participants identified telephone economic losses;
- Ten (10) participants identified property replacement or damage;
- Nine (9) participants identified emergency housing economic losses;
- Seven (7) participants identified security related economic losses;
- Seven (7) participants identified employment related economic losses;
- Six (6) participants identified school/services cancellation economic losses;
- Four (4) participants identified counseling/psychologist/psychiatrist economic losses;
- Three (3) participants identified childcare economic losses;
- Two (2) participants identified other economic losses (for alcohol purchases, sheriff's costs and lawyers' fees);
- Zero (0) participants identified unplanned pregnancy economic losses (even though some assaults resulted in pregnancy).⁴⁹⁴

⁴⁹⁴ Despite none of the participants in this survey providing information on such losses, economic losses can be inferred as a result of the various obstacles related to a pregnancy resulting from a rape. In *It's Me, Anna* (2005), Lotter, recites the options she faced after a pregnancy resulting from a rape. In this regard, she lists the following: the possibility of having 'an abortion in a neighboring country [such as Lesotho]' (Lotter 2005: 147); the possibility of having an illegal abortion in South Africa (Lotter 2005: 157); the possibility of going to a 'home' to 'have the baby, give it up for adoption (Lottter 2005: 165)... [and] continue studying while you're there... [while] register[ing] for a course at a correspondence school' (Lottter 2005: 165); the possibility of discontinuing standard nine exams due to sickness resulting from pregnancy; and the possibility of postponing the criminal case to have blood tests completed to prove the

To determine whether the survey participants' expectations are consistent with the presumptions put forth by the Law Reform Commission and existing victimization economic loss literature, the following comparisons are helpful.

In the South African Law Reform Commission's 2001 Discussion Paper, the estimated costs of being raped and indecently assaulted were analyzed taking into consideration the following expenditures:

- 'Lost income'; ⁴⁹⁵
- 'Medical costs'; ⁴⁹⁶
- 'A welfare payment for unemployed persons' valued at R3 750 for unemployed rape victims; ⁴⁹⁷
- 'Pain and suffering' with eligibility tied to a permanent 5% decline in earnings or a short term loss of a full year's income; ⁴⁹⁸
- 'The costs of obtaining counseling and support'; ⁴⁹⁹
- The costs associated with 'obtaining HIV/Aids prophylactic medication'; ⁵⁰⁰
- 'The costs of visiting the district surgeon, providing evidence to the police and attending court.' ⁵⁰¹

(alleged) offender impregnated her (Lotter 2005: 171). Also note that Rasool et al (2002: xvi-xvii) confirmed that 15% of survivors of sexual abuse in their study 'became pregnant' and '11% had a child as a result of the most serious incident of sexual abuse' and that '23% of survivors said the district surgeon had not treated them for pregnancy.'

⁴⁹⁵ South African Law Reform Commission (2001) Section 6.4.1.1.

⁴⁹⁶ South African Law Reform Commission (2001) Section 6.5.4.3.

⁴⁹⁷ South African Law Reform Commission (2001) Section 6.9.2.

⁴⁹⁸ South African Law Reform Commission (2001) Section 6.4.1.5.

⁴⁹⁹ South African Law Reform Commission (2001) Section 6.5.4.3.

⁵⁰⁰ Ibid.

⁵⁰¹ Ibid.

It was suggested in the Commission's Discussion Paper, based upon the above heads of damages, that 'compensation [paid out by an envisioned state compensation fund] might be valued at approximately R2 000 per survivor [as 'general' damages]' ⁵⁰², plus additional payments for other 'special' heads of damages, such as loss of earnings and medical expenses.

The heads of damages, or subsets thereof, which were not considered in the Commission's rape and indecent assault costing model, but whose absence was acknowledged by the Commission ⁵⁰³, were as follows:

- 'The ordinary costs of medical care over and above that provided by the state';
- 'Costs associated with making the necessary modifications to the home and/or workplace to accommodate the consequences of injuries';
- 'Costs associated with psychological and occupational therapies which may not be provided by the state';
- 'Costs associated with transport to and from doctors and hospitals (for the victim and her/his family)';
- 'Costs associated with the provision of medication or care that is not adequately provided through state institutions.'

The author notes that the following other significant types of economic losses were not acknowledged by the Commission and were absent in their costing model:

- Dental expenses;
- Telephone costs;
- Childcare economic loss;
- Costs associated with property damage and replacement;
- Costs associated with emergency housing;

⁵⁰² Ibid. Note that if R2000 was adjusted to for inflation using the South African Consumer Price Index, the 2012 equivalent would be approximately R3500 (information and calculations provided by the author's supervisor A Barratt).

⁵⁰³ South African Law Reform Commission (2001) Section 6.4.1.3.

- Costs associated with security upgrading;
- Costs associated with post-assault drug and alcohol abuse and digestive disorders;
- Economic losses relating to lost educational fees;
- Economic losses relating to an unplanned pregnancy;
- Economic loss associated with customary law obligations or community forums;
- Costs associated with insurance deductibles, increases in insurance premiums, and use of limited or capped insurance benefits;
- Economic loss related to 'secondary health effects such as depression, behavioral problems in child witnesses to violence, and reduced educational and employment opportunities' ⁵⁰⁴;
- 'Family income losses.' ⁵⁰⁵

It can therefore be stated that the participants' expectations, in relation to their overall *heads of damages*, are for the most part consistent with the presumptions put forth by the Law Reform Commission and the reviewed literature. In this regard:

- The vast majority of participants noted less than R1000 in special damages and therefore it can be assumed that nominal compensation amounts would assist indigent victims with their unexpected expenses related to their physical and

⁵⁰⁴ Day and McKenna (2002: 315). These costs are also referred to as 'intangible' losses by Frank (2005: 34); with regards to rape, she confirms that 'examples include the immediate emotional trauma experienced by the victim, the ongoing trauma and fear that may result from the incident (possibly emerging sometime after the event and lasting over an indefinite period), and the overall emotional and behavioral impact for the victim e.g. avoiding certain areas, avoiding certain kinds of work, etc.' Furthermore, Frank notes that 'these [intangible losses] are impossible to quantify in monetary terms, and both ideological and methodological problems arise in attempting to do so.'

Other commentators have also suggested methodologies for overcoming the difficulties in calculating these intangible losses. For instance, K Dalal et al in 'Cost Calculation and Economic Analysis of Violence in a Low-Income Country: A Model for India' 5(1) African Safety Promotion (2007) at 50 confirm that 'a victim of violence suffers three types of deprivation, namely physical deprivation, psychosocial deprivation and family deprivation.' To 'calculate intangible effects' the authors suggests looking at 'deviation[s]' from income; the 'psychosocial effects on the victim's family income' and 'interviews based on a protocol for losses due to psychosocial deprivation[s].'

⁵⁰⁵ Dalal and Jansson (2007: 46).

emotional recoveries. In this regard, taking into consideration the nominal financial losses noted by most participants, it is likely that the victims of sexual violence would not find the amounts proposed in the Discussion Paper, adjusted to present day inflation, unreasonable or insulting.⁵⁰⁶ Furthermore, the Rand estimates of the majority of the participants surveyed are within the amounts prescribed for in the SRDG⁵⁰⁷ and in addition, the author asserts that these nominal amounts could easily be reviewed in sentencing hearings when compensation is requested by victims without overburdening prosecutors, offenders' legal aid counsel and the judiciary.

- The heads of damages identified by the participants are consistent with the Commission's suggestions and the literature reviewed. In addition, the 'catch all' categories suggested by the Commission in the form of a 'welfare payment for unemployed persons' and the R2000 general damages award would indeed assist many participants with most of the heads of damages identified.

Furthermore with participants incurring such a broad range of economic losses,

⁵⁰⁶ Determining if claimants of an envisioned criminal compensation fund, or recipients of social grants, would be insulted by nominal payments requires a race, class and cultured analysis. A black, unemployed woman, living in a township, in a shack, with or without a disability, and dependents, may have different expectations regarding state compensation and assistance as compared to a white, employed woman, with no dependents, living and working in the Central Business District. The issue of whether claimants would be insulted by nominal general damages payments from an envisioned criminal compensation fund was discussed in the Law Reform Commission's Discussion Paper (2001) at Section 6.3, where it stated that '[...]government generosity costing] variables should be determined... [so that] it is ensured that compensation paid is reasonable and will not add insult to the already injured victim.'

Furthermore, see SS Terblanche's comments at Section 3.3.2.7. of the *Summary of Proposals Submitted for Comment in the Issue Paper On Restorative Justice and the Discussion Paper on a Compensation Fund for Victims of Crime*, obtained by the researcher from the Department of Justice and Constitutional Development via a response, dated 10 August 2006, to an application for Access to Information in terms of the *Promotion of Access to Information Act 2000*: 'Although I believe that rape victims will speak for themselves, I think that the proposed R2 000 compensation will be considered by many to be a slap in the face. When compensation is linked with aims such as increasing the legitimacy of the criminal justice system, the seriousness of the offence becomes a relevant factor. Since rape is one of the most serious crimes that can be committed in South Africa, R2 000 will not improve impressions of the legitimacy of the criminal justice system.'

⁵⁰⁷ Regulation 29 of *Regulations No R 418* dated 31 March 1998 of the *Social Assistance Act No 59 of 1992* 'Determination of the amount and the period of social relief of distress' provides that this grant is available for a maximum of six months in an amount not exceeding that which is paid for other social grants and that 'transportation expenditure may be approved in exceptional circumstances where...[a]n applicant is referred for treatment by a medical officer and no other arrangements can be made for transport.'

perhaps a lump-sum, tariff-rate and *'catch-all'* approach is the most rational way to approach the administration of compensation orders in sentencing courts for the indigent or impoverished victim, when there is an offender with financial means.

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8.4 Race, class and cultural barriers

This subsection will review how the race, class and cultural concerns of the participants intersect with gender barriers. Furthermore comparisons will be made with the economic loss discourse in the SALRC Discussion Paper as well as other academic literature.

Thirty-four (34) of the forty-seven (47) participants were black, isiXhosa first language speakers.⁵⁰⁸ In addition, eight (8) participants were coloured Afrikaans first language speakers, with the remaining five (5) participants being white, English first language speakers.

In addition, the vast majority of participants were identified and interviewed at the TCC in Manenberg, and these participants mostly came from the black townships/informal settlements of Khayelitsha, Nyanga and Guguletu, while most of the remaining victims were identified at Rape Crisis offices in Observatory. As will be discussed further, a noticeable difference in compensation losses and perceived entitlements was evident when comparing the white, English first language participants identified in the Observatory Rape Crisis offices (located closer to Cape Town city centre) as opposed to the black, isiXhosa first language participants identified at the TCC or Khayelitsha Rape Crisis offices (located in the townships/informal settlements outside of Cape Town city centre).

Although only eight (8) of the participants self-identified themselves as unemployed, as employment and class related questions were not directly asked in the survey, by referencing other data obtained, it is assumed that many more were economically impoverished irrespective of their stated employment status. For example, one participant noted that she was self-employed 'selling sweets, chips and eggs' in the

⁵⁰⁸ Participants' languages were noted without reference to their literacy abilities as literacy issues were not canvassed in the research design. Regardless, it should be noted that literacy issues remain an important 'access to justice' concern which directly affects the compensation entitlements of sexual assault survivors.

informal sector; others noted that they were previously employed in factories and in supermarkets; another participant lamented about living in a 'shack in a squatter camp' with six other dependants; and, yet another participant complained of the hardship of absorbing the sudden costs of relocating from her informal shack within a township for security reasons.⁵⁰⁹

Furthermore, three (3) participants confirmed they had incurred individual or familial debt due to the sexual assault, with one township participant noting that 'she would have to save a lot of money because she was constantly ill' and her 'family lost a lot because [she] was not working.'

The survey findings confirmed the below findings:

- Three (3) participants did not have money, or time, to arrange emergency housing so they obtained assistance from their employers, neighbors, friends or relatives;
- Three(3) participants did not have time to attend to their physical and emotional recoveries so their employers gave them 'time off with pay' or allowed them to 're-schedule shifts;'
- Three (3) participants borrowed money from friends or relatives, or obtained assistance from them, for transportation costs to medical services;
- Two (2) participants did not have money, or time, to arrange childcare so they relied on a neighbor's, friend's or relative's goodwill;

⁵⁰⁹ The Western Cape Department of Housing *Informal Settlements Handbook* (2003) Section 4.12.4.3. confirms that 'although informal dwellings are often made of 'temporary' materials, these nevertheless have had money spent on them. The cost of dwellings in an informal settlement represents a considerable investment when added together.... [in addition to] the opportunity cost of demolishing and rebuilding dwellings elsewhere. In addition to securing the proper materials for your shack, namely 'timber off-cuts near sawmills to wood frame and corrugated iron construction in the cities', one must also mitigate the 'degree of fire hazard' when constructing the informal dwelling.

- One (1) participant did not have money, or time, to arrange counseling so she relied on a relative's goodwill;
- One (1) participant did not have money for property replacement so she relied on a relative's goodwill;
- One (1) participant did not have money for telephone calls so she relied on employer's goodwill.

Economic loss literature also confirms that losses or debt incurred as a result of a sexual assault is often shared by the entire family unit, friends and even helpful employers.⁵¹⁰

Moving on the following data also suggests that a number of the survey participants viewed the economic costs of attending government services or court following the victimization prohibitive and detrimental to their recovery and to their access to justice.

- One (1) participant noted that she could not afford childcare when she attended court;
- One (1) participant noted that she could not afford transportation to counseling;
- One (1) participant noted that she could not afford transportation to psychologist;

⁵¹⁰ Tebo (2005: 44) notes that

many employers 'in efforts to protect an employee... seek restraining orders, provide funds to help the victim move and seek other means to stand up the abuser.' Tebo cautions employers that these exemplary actions must also be tempered due to possible legal liabilities. In this regard, she confirms that 'a direct inquiry about the nature of an employee's injuries may violate medical privacy laws' and 'it can be unwise for an employer to give substantive advice, such as telling a victim that she needs to seek a restraining order against the abuser [because] if the victim interprets that advice as an order from the boss, it could be construed as inherently coercive - especially if the employee follows it to her detriment.' This can occur because employers may assist victims for their own benefit in addition to wanting to help their employees as they want to neutralize the following concerns: 'harassing phone calls that disrupt the business day', 'potential violence erupting at the workplace', and 'lost productivity from someone with a reoccurring need for time off to seek counseling and medical and legal help.'

- One (1) participant noted she could not afford emergency housing costs; and,
- One (1) participant noted she could not afford to take unpaid leave from work to deal with her recovery.
- Many participants noted school costs and/or cancellations.

Other participants did not even identify economic losses as a result of the sexual violence. This may indicate that class affects a victim's perceptions of entitlement to compensation or to free services. In this regard, some participants reported that:

- Childcare was not required as a child 'was old enough to cope on her own';
- Counseling was not required for an abused female, assaulted with a gun, with current post-traumatic stress symptoms;
- Pregnancy related economic losses were not incurred by a participant who conceived an unplanned child after a sexual assault;
- Transportation costs to service providers and the court were not considered by a participant to be an economic loss resulting from sexual violence.

Finally, with regards to participants' responses relating to family or community dispute resolution issues and ongoing personal security concerns, which are closely related to race, culture and class issues:

- Eight (8) participants confirmed that there were discussions between the family members of the (alleged) offender and family members of the (alleged) victim on how the sexual assaults should be resolved (sometimes with compensation, other times by referring matters to street committees, and on occasion, by approving the laying of a charge with the police);

- Four (4) participants confirmed that street committees were involved in post-sexual assault resolutions (sometimes suggesting compensation, other times by referring matters to the police);
- Four (5) participants confirmed that they had concerns that the (alleged) offender is part of a 'gang' and feared reprisals against them or others;
- Two (2) participants noted that they saw the (alleged) offender in public after the sexual assault;
- One (1) participant noted that the (alleged) offender was a friend of her landlord's;
- One (1) participant noted that the (alleged) offender's lawyer contacted her on the status of the criminal prosecution;
- One (1) participant noted that she felt she could not pursue a criminal case, after withdrawing the charge of sexual assault because the (alleged) offender's family promised her compensation money, which was not provided.

Three core areas need to be reviewed when examining victimization economic losses in relation to the race, class and culture characteristics of the participants and their overall heads of damages. Firstly, the legitimacy of race/class costing differentials must be addressed; secondly, issues concerning the absorption of sudden emergency costs or interruptions of income, in relation to the family unit must be reviewed taking into consideration class differentials; and thirdly, cultural financial economic losses must also be reviewed.

With regards race/class differentials, the Law Reform Commission confirmed that 'victims and their dependents of differing races are, on average, likely to suffer different levels of material loss as a result of their victimization' and 'the absolute value of the material losses sustained by the formerly disadvantaged will be lower than those of the

privileged.’⁵¹¹ With this in mind the Commission suggests that ‘this has meant that, when looking at the value of the compensation which victims will receive, it is an unfortunate reality that victims of different races would, on average, receive different levels of compensation [with regards to the Commission's proposed costing model and payout criteria for a envisioned South African state victim compensation fund].’⁵¹²

The Commission further confirmed that ‘the [financial] impact of violent crimes on poor victims is often disproportionately large relative to the impact of similar crime on the lives of richer victims.’⁵¹³ In this regard, the Commission cites ‘social ills’, lack of ‘stable social structures’, ‘weak criminal justice presence and personal security’, ‘absence of medical schemes and insurance’ and ‘lower standards’ of medical, rehabilitative and psychological care associated with poor victims as compared to wealthy victims.⁵¹⁴

The victimization cost differential between races and classes is not confined only to South Africa. For example, T Day et al in their chapter ‘The Health-Related Economic Costs of Violence Against Women in Canada’ confirm that as compared to ‘many sectors of [Canadian] society, such as those who suffer from discrimination based on race or ethnicity, the disabled, and those living in poverty, the costs are likely to be multiplied many times more than for women without these characteristics.’⁵¹⁵

With regards to the second issue, namely the economic burdens and losses of the family unit, a South African Medical Research Council community-based prevalence study, completed in three provinces, confirmed that ‘injuries [against women resulting

⁵¹¹ South African Law Reform Commission (2001: 120).

⁵¹² Ibid.

⁵¹³ South African Law Reform Commission (2001) Section 6.9.1.

⁵¹⁴ Ibid. In addition to black South Africans being disproportionately affected by crime, it is also noted with regards to ‘level of citizen satisfaction with treatment by police officers’ in the Public Service Commission’s *Citizen Satisfaction Survey: Overview Report of the Criminal Justice Sector* (2005: 24) that white respondents had the highest tendency to report that they were satisfied with the manner in which their [criminal] cases were handled [by the police] in comparison to Africans (71% vs. 60% respectively).’

⁵¹⁵ Day and McKenna (2002: 317). See also Smith (2006: 320) for a proposed race/class priority framework of government victim compensation/assistance in the United States as opposed to a gender priority framework.

from various forms of physical abuse] result in costs being incurred in other sectors [in addition to the health sector], notably to the family and the women's community.'⁵¹⁶ This is consistent with other costing studies conducted in the developing world.⁵¹⁷ As can be evidenced from the participants' responses, victimization adversely affects family, friends and employers and sudden financial and practical sacrifices are often required by each of these persons.

Finally, with regards to the third issue, namely cultural costing, L Longmore, in *The Dispossessed, a study of the sex-life of Bantu women in and around Johannesburg*, astutely notes that:

'African cost of living... covers many outlays that do not figure in western society at all, but which are essential to African social well-being. Payment of *lobolo* (marriage consideration), fees to African doctors, and special costs imposed in the form of traditional obligations to kinsmen (where they still operate) are all legitimate items of expenditure.'⁵¹⁸

Further to Longmore's comments, it is important to recognize that traditional and community related costs, remain a large expense for many black South Africans today, in both urban and rural environments, and that these traditional expenditures necessarily intersect with incidents of sexual violence. In this regard, the following customary and community related costs may necessarily affect reporting levels and prosecution attrition rates in sexual violence cases: payments to community courts/street committees and community savings clubs; the costs of cleansing ceremonies; payments for sexual delicts in traditional or community courts; payments for damages as a result of a loss of virginity; payments of damages for children born out

⁵¹⁶ Jewkes et al (1999: 1).

⁵¹⁷ Dalal and Jansson (2007: 48) confirm that 'in low-income countries, families are usually dependent on one person's income [and] if the family breadwinner sustains an injury, the whole family suffers several socio-economic problems.' Furthermore it is noted that in low income countries there is 'a socio-economic set-up where a high proportion of citizens are illiterate and live below the poverty line and most people survive on one person's income.'

⁵¹⁸ Longmore (1966: 21)

of wedlock; payments for damages in cases of adultery; and return of *lobolo* upon dissolution of marriage.⁵¹⁹

Cultural economic losses after victimization are common in other developing countries. In this regard, K Dalal and B Jansson in their article '*Cost Calculation and Economic Analysis of Violence in a Low-Income Country: A Model for India*' include cultural expenses in their costing equations such as 'natural traditional treatments.' The authors also acknowledge that 'if the victim's relatives have vowed an offering to a deity, which is very common in low-income countries, then allowance should be made for some expenditure on deity.'⁵²⁰

In light of the above, it can be stated that the participants' expectations, in relation to their race, class and cultural issues, are partly consistent with the presumptions put forth by the Law Reform Commission and other literature. In this regard:

- Survey data suggested that a number of the survey participants viewed the economic costs of attending government services or court following the victimization prohibitive and detrimental to their recovery and to their access to justice. This concern was also alluded to in Statistics South Africa's 2012 Victims of Crime Survey wherein it was confirmed that "only 19.4% [of participants] indicated they would get anti-retrovirals [post sexual assault]."⁵²¹
- A race/class costing differential seems reasonable when designing social assistance and court restitution programmes for victims of sexual violence due to the disproportionate effects of victimization on indigent black women in townships as evidenced by the participants' responses. More specifically, there was a

⁵¹⁹ See Greenbaum 'An Elaboration of the Themes and Contentions in Mmatshilo Motsei's book *The Kanga and the Kangaroo Court, Reflections on the Rape Trial of Jacob Zuma*' SAJJC (2008); JMT Labuschagne et al 'Liability for adultery in South African indigenous law: an analysis of the case law' 32 *CILSA* (1999) 98; Prinsloo et al 'Perceptions of the law regarding, and attitudes towards lobolo in Mamelodi and Atteridgeville' 1 *De Jure* (1998) 72; and, E Bahre *Money and Violence, Financial Self-Help Groups in a South African Township* (2007).

⁵²⁰ Dalal and Jansson (2007: 48 and 51).

⁵²¹ Statistics South Africa (2012:54).

noticeable difference in identification and amounts of economic losses when comparing the responses of white participants in the city centre as compared to black township participants. Both classes/categories of women require financial assistance but because of financial and practical blockages in the courts and social assistance processes, it is possible that they can be assisted in different manners. In this regard, poor impoverished women require minimum levels of compensation, perhaps based on tariffs, from both social assistance providers and from offenders via compensation orders at sentencing dispositions. This is compared to financially viable women who require: employment and loss of earning laws to protect them after victimization; easier access to civil remedies and legal aid; and fair insurance laws regarding deductibles and payout criteria. This approach is consistent with the Commission's suggestions and the literature.

- As evidenced by the participants' responses, victimization economic losses directly affect dependents, family, friends, neighbors and employers. Social assistance programmes should therefore be guided by this reality and they should assist indirect-victims and non-victims with loans and debt relief programmes. In addition, as employers regularly provided assistance to participants, legislation is needed to protect and assist employers from liability and the direct costs involved in their interventions. It would seem that the Commission's suggestions and the literature did not adequately address this issue with comprehensive and gendered alternatives.
- Social assistance and court restitution programmes should promote their services and inform victims of their rights with regard to these services. As evidenced by the participants' responses, race and class phenomena result in victims not accessing social assistance grants and court restitution options as they are not aware of their eligibility or need. Examples include participants who did not have a sense of self-entitlement to childcare economic losses, counseling economic losses, transportation economic losses and pregnancy economic

losses. It would seem that the Commission and the literature did not adequately address this issue as well with comprehensive and gendered alternatives.

- Finally, although participants did not directly identify cultural economic losses, they frequently referred to the existence of informal mediations between family members and street committees, and with this in mind, customary/community economic transactions and bartering played a role in these interactions. Therefore it would be helpful for the National House of Traditional Leaders and the Commission on Gender Equality to review the current status of the court reparation processes and the administration of social assistance grants to ensure they are culturally sensitive and aligned with customary and community support structures. There is a complete absence of analysis in the Commission's suggestions and existing western literature, on the nexus between culture and economic loss, after victimization. Dalal et al identify and elaborate on this important issue, by describing how India as an example of a low-income developing country in which cultural norms regularly interact with victimization economic losses and recoveries.

8.5 Engagement with the criminal justice system

Practical trade-offs and sacrifices in relation to criminal court appearances must be assessed when researching victimization economic losses.

Sexual violence victims may provide assistance to the criminal justice system in the following specific ways: by assisting police investigations by providing statements⁵²² and by attending identity parades; by providing forensic body samples⁵²³; by attending and providing viva voce evidence at bail hearings, trial hearings and sentencing dispositions; by assisting social workers with victim impact statements which are compiled to assist the Court with sentencing decisions; by assisting Department of Correctional Services officers when they complete pre-sentencing reports which are compiled to assist the Court with sentencing decisions; and, by attending and giving viva voce and written evidence to Parole Boards when offenders' probation periods are in question.

As set out in the detailed survey findings in Appendix 3, victims confirmed that participants who provided the above police or prosecutorial assistance incurred the

⁵²² In her Canadian autobiography, *The Story of Jane Doe, a Book about Rape*, Doe confirms that she was forced to repeatedly review the intimate details of her rape in police interviews and police investigation processes, such that she posed the following questions to her readers: 'I'll never understand why cops don't tape-record their interrogations of women who've been raped' and 'how many times do they have to hear all this stuff?' (Doe 2004: 43).

⁵²³ Doe (2004: 21) confirms that 'the massive amount of drugs that doctors administer during the gathering of the sexual-assault evidence kit, combined with the trauma of rape, can cause you to miss your period or otherwise mess with your menstrual cycle and make you feel unwell.' Doe goes on to relay her post-rape medical care, and the Ontario forensic framework, at 304: 'all Sexual Assault Care Centers (SACC), located in hospitals, offer counseling and health care to raped women, but their main function is to perform the testing required to compile the sexual assault evidence kit. SACCs do not require raped women who do not report to the police to undergo forensic testing. There is, however, an institutional bias for them to do so. I described my experience earlier, but just to recap: A doctor, usually male, gives you an internal to verify penetration and to capture any rape sperm. There is usually a good chance of this as no one has allowed you to pee. You stand on a sheet in the middle of a room. Hairs are removed from your scalp and plucked from your public area. Skin cells are scraped from your shin. Blood is taken from your arm. Saliva from your mouth. They give you massive doses of antibiotics and morning after pills that make you ill. Everything is put into a little box and put away, and you never see it again.... anyone would agree that the tests are invasive and intrusive. I can testify that they are experienced by women involved as a second assault.'

following types of economic losses: transportation costs; child care costs; telephone costs; lost income; and, employment, familial and school disruptions.

With regards to 'citizens' trade-offs and inconveniences to be present at [criminal] court,' the Public Service Commission's *Citizen Satisfaction Survey: Overview Report of the Criminal Justice Sector* confirmed that – in addition to many other sacrifices involving time, care of dependents and lost income – 39% of court users, surveyed in 42 magistrates courts throughout the country 'had to spend a lot of money' to attend criminal proceedings.⁵²⁴

Apart from the monetary sacrifices to assist police and prosecutorial processes, victims also jeopardize their emotional well-being when they engage with the criminal justice system. In this regard, many participants indicated that they feared the offender, such that their co-operation with police and the prosecution likely produced secondary victimization as the participants had to face the (alleged) offender in court. This is above and beyond the emotional strain inherent in all adversarial court proceedings, be they civil or criminal.

The Law Reform Commission partly recognized some of the above concerns in their Discussion Paper when it noted that rape and indecent assault victims should be entitled to redress for 'the costs of visiting the district surgeon, providing evidence to the police and attending court.'⁵²⁵

In light of the above, it can be said that the participants' expectations, in relation to economic losses resulting from police investigations and court processes, are consistent with the presumptions put forth by the Law Reform Commission and the literature. In this regard:

- Participants noted that financial hardship occurred when assisting with investigations and or prosecutions due to childcare arrangements and costs,

⁵²⁴ Public Service Commission (2005:16).

⁵²⁵ South African Law Reform Commission (2001) Section 6.5.4.3.

transportation arrangements and costs, telephone costs, absences from employment/school and income losses.

- Some of the participants noted partial or full payment of transportation costs by the court or prosecutors in relation to their attendance for court matters or prosecutors' pre-trial consultations. While, other participants confirmed that they were financially responsible for transportation and other costs associated with these engagements and they were not told about or assisted with witness and victim fees/subsidies from the court administrators or prosecutors.⁵²⁶

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⁵²⁶ With regards to 'explanations and information provided to court users,' the Public Service Commission's *Citizen Satisfaction Survey* (2005: 15) confirmed that 36% of court users, surveyed in 42 magistrates courts throughout the country, indicated that they were not told 'about their right to claim a travel reimbursement for attending court' and with this in mind the Commission noted 'it is of concern that users of a low socio-economic status were significantly more likely than users of a high socio-economic status to have lacked any explanations as to what to expect when the case is heard.'

8.6 Views on compensation from offenders

Of the forty-seven (47) participants who completed the survey the following classifications statements regarding the types of (alleged) offender(s)' were made (with some participants confirming multiple offenders):

- Twenty (20) participants identified the (alleged) offender was a prior acquaintance or a known community member;
- Twelve (12) participants identified the (alleged) offender as a stranger;
- Eight (8) participants identified the (alleged) offender as a boyfriend or former boyfriend;
- Two (2) participants identified the (alleged) offender as an unspecified relative;
- One (1) participant identified the (alleged) offender as a father;
- One (1) participant identified the (alleged) offender as a husband;
- One (1) participant identified the (alleged) offender as a brother;
- One (1) participant identified the (alleged) offender as a landlord's friend;
- One (1) participant identified the (alleged) offender as a father's neighbor; and,
- One (1) participant identified the (alleged) offender as a father's work colleague.

Of the forty-seven (47) participants who completed the survey the following assessments of the (alleged) offender(s)' capacities to provide compensation were made:

- Twenty-one (21) of the participants asserted that the (alleged) offender had no recognizable assets or income;
- Fourteen (14) of the participants asserted the (alleged) offender had current or past employment income and/or family or individual assets (such as a home or car); and,
- Twelve (12) of the participants did not comment or were unaware of the (alleged) offender(s)' capacities to provide compensation.

Of the forty-seven (47) participants who completed the survey, the following preferences were noted regarding the possibility of offender(s)' paying compensation:

- Twenty-three (23) participants indicated that they did not want (alleged) offender(s)' compensation;
- Nineteen (19) participants indicated a preference for (alleged) offender(s)' compensation; and,
- Five (5) participants indicated they had no comment or were unsure about their preferences regarding (alleged) offenders' compensation;

Furthermore, the participants elaborated on their preferences regarding the (alleged) offender(s)' compensation as follows:

- Ten (10) participants wanted the (alleged) offender(s) to pay compensation despite asserting that the (alleged) offender(s) had **no** current or past employment income, or alternatively, **no** family or individual assets;
- Eight (8) participants wanted (alleged) offender(s) to pay compensation and asserted the (alleged) offender(s) had current or past employment income, or alternatively, family or individual assets;
- Four (4) participants did not want (alleged) offender(s) compensation despite asserting that the (alleged) offender(s) had current or past employment income, or alternatively, family or individual assets;
- Three (3) participants wanted their stolen goods returned; and,
- One (1) participant was unsure about her preferences regarding (alleged) offender(s) compensation despite asserting the (alleged) offender(s) had current or past employment income, or alternatively, family or individual assets;

Finally, of the forty-seven (47) participants who completed the survey the following alternative preferences, in addition to (alleged) offenders' compensation, or as a standalone punishment/sentence, were also noted:

- Forty-two (42) participants indicated a preference for incarceration of the (alleged) offender(s) (from one year to 50 years in prison, and with participants noting that the (alleged) offender should be punished with a "longer sentence than for murder" or with a longer term than sentenced to as "the terms that they serve are ridiculous").

- Seven (7) participants indicated a preference for (alleged) offender(s)' apologies, public statements or public/private recognitions of wrongdoing;
- Seven (7) participants indicated a preference for the infliction of pain/death on the (alleged) offender or some other form of degrading punishment (including beatings by vigilante groups, acts of revenge, solitary confinement, community service in mental institution, physical assault, falling ill or killing);
- Three (4) participants indicated a preference for informal community or cultural sanctions (including apologies from the parents of (alleged) offender(s), compensation from the family of the (alleged) offender(s) and community condemnation and support);
- One (1) participant indicated a preference for (alleged) offender therapy;
- One (1) participant indicated that punishment should also reference child custody concerns;
- One (1) participant indicated that punishment should also reference maintenance concerns noting that the (alleged) offender should go "to jail because he don't even support a child" and lied to maintenance court about employment status; and,
- One (1) participant indicated that punishment should not be dealt with via informal community or cultural sanctions when she stated that she does not want (alleged) offender to "just pay for blood."

Two broad issues are now examined in this section in relation to the above findings: firstly the issue of (alleged) offender relationships with the participants and how this might affect their ability to pay compensation; and secondly, matters concerning the compensation and sentencing preferences of the participants.

With regards to the first issue, namely the relationships of perpetrators with their victims and their ability to pay compensation, the Law Reform Commission notes that 'just as there is often little point in a [criminal] court order for compensation in terms of section 297 [of the Criminal Procedure Act], in most cases of violent crime there is [also] little

that the victim can gain from a civil action as the offender is more often than not unlikely to be able to fulfill any civil judgment against him or her.’⁵²⁷

This assertion is contradictory to the participants' responses and the literature reviewed. Many of the participants believed that (alleged) offender(s) likely had assets or income that could be subject to compensation orders (although it is acknowledged that many other participants believed that the (alleged) offender did not have means to fulfill compensation orders). Furthermore, the literature confirms that some offenders are able to satisfy compensation orders and references the significance of the relationship between the perpetrator and victim when compensation concerns are at issue. For example, teachers, professors, priests, employers, coaches, co-workers, landlords and civil servants who sexually abuse an individual, may be able to pay compensation from their business or employment income and personal assets.⁵²⁸ Also note that the literature confirms that sexual violence affects all classes and financial strata of society, and as such, the Law Reform Commission's above-statement may be overly broad.

With regards to the second issue, namely the compensation and sentencing preferences of victims it was clear from the participants' responses that no general statement can be made that can encapsulate all sexual assault victims' desires and preferences.⁵²⁹ Rather, each victim's wishes must be assessed individually taking into consideration race, class, culture, dependent obligations, (dis)ability and personal circumstances. It would seem that participants who were opposed to (alleged) offender compensation will likely be more accepting of state assistance in light of their comments reflecting an aversion to offender interaction and in light of the preceding analysis of their economic losses.

⁵²⁷ South African Law Reform Commission (2001) at Section 4.2.

⁵²⁸ See subsection 7.1.1 which reviews numerous studies that conclude that many offenders are employed and some have high incomes.

⁵²⁹ Note that victims' compensation concerns should be addressed in the criminal justice system pursuant to numerous government policy documents as opposed to their sentencing wishes. In this regard, in *S v M* 2007 (2) SACR 60 (W) at 89 it is confirmed that there are 'differences in opportunities, psyches, physical strength, age, family or other support available to different rape survivors, and which result in different manifestations of trauma.'

In light of the above, it can be said that the participants' expectations, in relation to compensation by the (alleged) offenders, are not consistent with the presumptions put forth by the Law Reform Commission.

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8.7 Conclusions

Many of the participants who completed the survey were able to identify economic losses resulting from both their victimization and their engagement with the criminal justice system. With this in mind the prosecutors and the judiciary can assist with ensuring indigent victims and their dependents benefit from the sources of compensation enumerated in subsection 1.1, namely the SRDG/CWS and other forms of offender based compensation pursuant to the CPA and POCA.

Unfortunately, survey results confirmed that there was no financial assistance provided to any of the participants who took part in the survey, to assist them with:

- economic loss(es) related to their recoveries;
- economic loss(es) resulting from their victimization;
- economic loss(es) resulting from their engagement with the criminal justice system;
- and/or economic loss(es) relating to interruptions to familial and cultural commitments and/or for care of dependents.

Furthermore, black impoverished participants clearly identified race, class and cultural concerns that heightened the negative effects of their gendered economic losses, when compared to white middle class participants. In this regard, it can be said that race, class and cultural concerns indeed exacerbated the effects of gendered economic losses as a result of victimization such that they disproportionately affected this class of participants. This in turn resulted in a discriminatory burden on black impoverished women with regards to access to free services, attending to physical and mental health concerns and their care of dependents and their general personal security. Again, these adverse and discriminatory effects were present despite the existence of the SRDG, numerous legislative prescriptions which provide for criminal compensation in sentencing proceedings, and community/cultural support structures.

It can therefore be concluded that the participants' survey responses verified the propositions set out in the beginning of this Chapter, namely that compensation provided by the state (via the SRDG and CWS), the alleged offender (via civil forfeiture proceedings) or the offender (via CPA sentencing provisions) would:

- Assist female victims' access to the criminal courts, security provisions, and free psycho-medical services;
- Assist female sexual violence complainants with money to address quantifiable gendered losses that are unique to this class of victims;
- Hold perpetrators accountable for the post-assault economic losses of complainants, in accordance with many victims' preferences.

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-PART SIX-
SUGGESTED REFORMS

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-CHAPTER NINE-
SUGGESTED REFORMS
AND PROBLEMS WITH RE-GENDERING THE CRIMINAL JUSTICE SYSTEM

9.Suggested Reforms

This thesis suggests that biases, amongst other factors, curtail compensation to victims of sexual violence and five suggested reforms are proposed to rectify this problem, namely: strengthening intersections between culture and compensatory court processes; ensuring continuing legal education is provided to state role-players; ensuring the provision of community education for the public and sexual violence survivors in particular; ensuring the alignment of SRDG/CWS application processes with prosecutorial processes; and finally ensuring that NPA policy directives properly instruct and guide prosecutors.

Before reviewing each of these suggested reforms it is important to note that societal stereotypes will continue to influence state role-players' decision making when they carry out their official functions. With this in mind this thesis suggests that it is also important to frame reform discussions in terms of a substantive equality approach (as noted in subsection 1.2). This approach entails a holistic review of equality and the imposition of positive measures to uplift sexual violence survivors when they engage with the criminal justice system as this approach recognizes both their historical economic vulnerabilities in society while also acknowledging that women are different than men on account of their dominant roles in families wherein they are mostly responsible for child and elderly care.⁵³⁰ It must be noted that this is currently not the approach taken by most gender violence advocates when reviewing discrimination in the criminal justice system, as they tend to focus their discussion on sentencing and evidentiary matters rather than substantive equality issues involving domesticity

⁵³⁰ Statistics South Africa (2010:ii) confirms that “poverty patterns continue to be gendered, and female headed households are more likely to have lower incomes, to be dependent on social grants and less likely to have employed members [and] women and female headed households are predominately responsible for the care of children.”

obligations and market assumptions that are often severely affected post sexual violence. More specifically, Joan Williams suggests that “we need to change the ways we talk about gender (including the way feminists do so)... [by] shift[ing] away from the current focus on sex and violence to a focus on the design of (market and family) work and entitlements that flow from it... [and] given the ways domesticity shapes both our institutions and our identities the most effective strategies for gender change [is to] use domesticity’s own momentum to flip and bend it into new configurations [that can benefit both men and women who manage families and market driven arrangements].”⁵³¹

Turning now to the suggested reforms, firstly it is important to strengthen the intersections between culture and compensatory court processes in South Africa. This in turn can result in more women reporting crime (thus escaping repeat victimization) and assisting in the prosecution of these offences as they can appease both customary and state gate-keepers. In this regard Chapter Six comprehensively reviews this matter and suggests that VIS and CSR should reference the suitability of customary arrangements that are arranged alongside sentencing proceedings and that government benefits, like the SRDG and CWS, should provide compensation for customary damages so women are not bound to participate in informal customary practices by male figureheads who would like to subsume payments for their own benefits.

Secondly, education and training of court role-players is critical to ensure that criminal compensatory provisions are employed in sexual violence cases. In this regard, the New Zealand Ministry of Justice has confirmed that:

‘...disproportionality [caused by bias] is exacerbated by a fundamental lack of.. understanding, sensitivity and responsiveness on the part of the criminal justice system (whether at an individual or organizational level)’ and therefore to respond to this problem ‘criminal justice agencies have typically adopted... inward focused responses [which] are directed towards improving cultural understanding and sensitivity within the criminal justice system in order to improve responsiveness... [including] training for staff.’⁵³²

⁵³¹ Williams (2000:7 to 8).

⁵³² New Zealand Ministry of Justice (2009).

With the above in mind, continuing legal education could focus on the following concerns: the general heads of damages of victims of sexual violence as outlined in Chapter Eight; court administration matters regarding court witness stipends⁵³³; and finally information on precedent compensatory cases in sentencing matters such as those reviewed in the case studies in subsection 7.2 of this thesis.

Thirdly, as noted by President Zuma 'citizen education' is a key component in overcoming access to justice concerns, in addition to continuing legal education for state role-players. 'Citizen education' can empower victims with agency by ensuring that they understand their rights in relation to compensatory criminal compensation, including the right to receive court stipends and the SRDG. However, Zuma acknowledges that:

'One main impediment to access for scores of our people is poverty. Due to poverty-related lack of education and ignorance, many people do not know the law and cannot exercise their rights. This makes the saying "ignorance of the law is no excuse"' an anomaly in a developing country.'⁵³⁴

Fourthly, the author suggests that prosecutors who work with complainants or witnesses should assist victims with their applications for SRDG, when appropriate. Letters that support grant applications should be prepared by prosecutors. In this regard, sub-section 15(1)(f), of Regulation 898⁵³⁵, prescribed under the Social Assistance Act 13 of 2004, concerning documents that 'accompany application for social relief of distress' allows for 'alternative proof' when submitting information for the SRDG. Furthermore, there is a precedent for civil servants, who are not social workers, assisting with grant applications, namely sub-section 15(1)(d) of Regulation 898, which authorizes

⁵³³ The NPA acknowledges problems with public access and awareness of court witness stipends and in the NPA's Crime and Criminal Justice Survey (2009: xiii to xiv) which included many respondents involved in violent crime matters it was confirmed that "respondents related most of their dissatisfaction to a lack of information [and] although information on all aspects of the court case and services available in the criminal justice system remains important, areas that still need special attention are information on what will happen in court, information on witness fees and information on medical, psychological, or community based victim support services."

⁵³⁴ President Jacob Zuma Keynote address at the 3rd Access to Justice Conference, Pretoria (08 July 2011).

⁵³⁵ Regulation 898 of the Social Assistance Act 13 of 2004, sub-section 15(1)(f).

corrections officials to assist relatives of convicted offenders, who are incarcerated in prisons, by providing them with 'proof of admission of his or her spouse to a prison [so these applicants can obtain the SRDG].'⁵³⁶ With the above in mind, prosecutors could be of great assistance by providing referral information and supporting letters to sexual violence complainants/witnesses while the NPA could ensure a formal MOU is in place to facilitate SASSA visits to court houses and court preparation service providers.

Finally, it is important that institutional role-players properly instruct their personnel. In this regard the NPA should examine its internal policies and staff performance evaluations to ensure they address the compensatory concerns addressed in this thesis. In this regard, the New Zealand Ministry of Justice has confirmed that '[approaches to overcome bias include] organizational strategies or policy statements.'⁵³⁷

It is important to note that prosecutors require some discretion in matters involving compensatory sentencing and forfeiture processes for the administration of justice to work properly. Therefore mandatory compensation laws will not cure the problem of gender bias. This discretion is necessary because there are a myriad of victim concerns and contingencies that can be addressed by a variety of different compensation processes. Accordingly, prosecutors need flexibility to ensure offender accountability and victim redress co-exist in a complementary fashion (for example in the case studies in Chapter Seven, eight (8) different types of compensatory processes are reviewed, some formal, some informal). Limiting the discretion of court-role players can also be counter-productive especially if compensatory reviews become mandatory and victims are forced to agitate offenders and their families, in pursuit of compensation, when this may not be advisable for security, cultural or emotional reasons. Finally, each component of the criminal justice system must work together and curtailing the discretion of one role-player can affect the efficiency of the entire criminal justice system. As an example, if compensation reviews are required in all sexual violence

⁵³⁶ Regulation 898 of the Social Assistance Act 13 of 2004, sub-section 15(1)(f),

⁵³⁷ New Zealand Ministry of Justice (2009).

cases then Correctional Supervision Officers may neglect other sanctions and concerns in their CSRs.⁵³⁸ On this issue, the New Zealand Ministry of Justice suggests that:

‘...responses directed towards reducing discretion implicitly assume that the key problem [with bias and discrimination] is too much discretion and that rule tightening will reduce discretion and therefore lead to less disproportionality. A number of research studies, however, have questioned this assumption and demonstrated that, in isolation from cultural, individual and broader organizational and/or social change, this type of response is unlikely to be successful in addressing disproportionate criminal justice outcomes.’⁵³⁹

To conclude this subsection, it can be said that in totality the above suggestions will not ensure the end of biases in the criminal justice system. This is so because lawyering tactics can subvert policy and legislative attempts to curtail the irrationality that leads to discrimination. In this regard Comack and Balfour, citing the Canadian example confirm that ‘in the interest of defending their clients, lawyers can strategically subvert and sabotage the intention of law reforms that they believe are politically motivated [by gender advocates as opposed to sound legal principles].’⁵⁴⁰

In addition, it is important to note, as confirmed by Joan Williams in *Unbending Gender*, that “much discrimination, far from being intentional, is not even conscious [as] women are systematically disadvantaged by shared expectations built into established patterns of behavior that become institutionalized as simply the way things are done [and therefore] we need to shift from a model that depicts discrimination as caused by a bad actor, who needs to be removed, to an analysis of established patterns of behavior that operate to disadvantage women in subtle but systematic ways without any one person being at fault.”⁵⁴¹

⁵³⁸ For example mandatory compensation reviews could result in Corrections officials placing victim compensation concerns over the benefits of ensuring offender’s pay for their own sexual violence psychiatric treatment when it is financial viable (see the case study in subsection 7.2.2 where these concerns had to be canvassed by court-role players).

⁵³⁹ New Zealand Ministry of Justice (2009: 113).

⁵⁴⁰ Comack and Balfour (2004:18).

⁵⁴¹ Williams (2000:205-208).

With the above in mind, as suggested at the beginning of this subsection, it therefore important to frame discussions in terms of a substantive equality approach as this approach entails a holistic review of equality and the imposition of positive measures to uplift sexual violence survivors when they engage with the criminal justice system. This is so at this approach recognizes both their historical economic vulnerabilities in society while also acknowledging that women are different than men on account of their dominant roles in families wherein they are mostly responsible for child and elderly care.⁵⁴²

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⁵⁴² Statistics South Africa (2010:ii) confirms that “poverty patterns continue to be gendered, and female headed households are more likely to have lower incomes, to be dependent on social grants and less likely to have employed members [and] women and female headed households are predominately responsible for the care of children.”

-PART SEVEN-
THESIS CONCLUSIONS

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-CHAPTER NINE-

GENDER BIAS AND CRIMINAL COMPENSATORY PROCESSES

10 Synthesis of all arguments

This thesis set out to prove that institutional biases were partly responsible for the inadequate utilization of state and offender compensatory processes, in matters involving sexual violence, in criminal and quasi-criminal civil forfeiture cases, and this in turn resulted in discriminatory outcomes. More specifically the neglected compensatory processes in question were first enumerated in subsection 1.1 (along with their foundational underlying theories) when it was noted that the following subjects would be reviewed: compensatory provisions in the Criminal Procedure Act (CPA) ⁵⁴³ and Correctional Services Act (CSA) ⁵⁴⁴ in relation to sentencing proceedings; compensatory provisions in the Prevention of Organized Crime Act (POCA) ⁵⁴⁵ in relation to civil forfeiture proceedings; and lastly, compensation derived from court supervised customary arrangements ⁵⁴⁶, as well as extra-judicial compensatory processes, namely court witness stipends and social grants for undue hardship. ⁵⁴⁷

To prove the above hypothesis this thesis first set out two newly formed definitions of 'gender bias' and 'gender discrimination' in subsection 1.2, and these definitions were based on Constitutional imperatives and international human rights discourses. Furthermore, these unique definitions included a criminal justice component as this thesis is concerned with the lack of utilization of compensatory provision in criminal and quasi-criminal forfeiture proceedings.

⁵⁴³ Act 51 of 1977 (CPA); see subsection 1.1 and 5.1 for a review of the compensatory sections in this Act.

⁵⁴⁴ Act 111 of 1998 (CSA); see subsection 1.1 and 5.1 for a review of the compensatory sections in this Act.

⁵⁴⁵ Act 121 of 1998 (POCA); see subsection 1.1 and 5.2 for a review of the compensatory sections in this Act.

⁵⁴⁶ See subsections 5.4, 7.2.3 and 8.4, and Chapter 6, for a complete review of the customary compensatory traditions that are reviewed in this thesis.

⁵⁴⁷ A review of the Department of Social Developments' Social Relief of Distress Grant (SRDG) and court witness stipends (CWS) takes place in subsections 5.3 and 6.1.5.

In this regard, 'gender bias' was defined in subsection 1.2 as a process in which irrational stereotypes and unfounded prejudicial assumptions are used by state role-players to justify preferential treatment for certain classes of victims in the criminal justice system (which contravenes subsection 9(1) of the Constitution and "the right to equal protection and benefit of the law" ⁵⁴⁸), or alternatively, to justify the lack of prosecutorial and court services available to female victims in the criminal justice system (which contravenes subsection 9(2)(3) and (5) of the Constitution as the state is obliged to "promote the achievement of equality" and to "not unfairly discriminate directly or indirectly...[on the prohibited ground of] gender [as this is presumed to be unfair discrimination] ⁵⁴⁹)."

Furthermore 'gender discrimination' - which is an outcome of biased decisions – was also defined in subsection 1.2 by referencing the above noted constitutional provisions. In this regard 'gender discrimination' was defined as the unnecessary aggravation of women's vulnerabilities, by state role-players in the criminal justice system, when they improperly address gender differentiations. Also it was confirmed that an important conceptual underpinning of the definition of 'gender discrimination' is the notion that in some situations equality can require different and special practices/laws to ensure the vulnerabilities of disadvantaged groups are properly dealt with, while conversely, in other situations, equality can require the same treatment, and the equal application of practices and laws to all classes of victims, to ensure the vulnerabilities of historically disadvantaged groups are not heightened. ⁵⁵⁰

⁵⁴⁸ Constitution, subsection 9(1).

⁵⁴⁹ Constitution, subsections 9(2)(3) and (5).

⁵⁵⁰ Note the comments of Joan Williams in *Unbending Gender* (2000:205-208) regarding this important distinction which she characterizes as the "special treatment/equal treatment debate":

"...treating women the same can leave women vulnerable...but treating differently can also leave them vulnerable as well... [therefore] feminist should recognize a small realm of "formal equality" where men and women should be treated the same, along with a much larger realm of "substantive equality" where man and women should be treated differently...[this is so because] treating women and men the same will backfire unless ["masculine norms"] are first dismantled. Otherwise women will be further disadvantaged when they are treated the same as men in the face of norms that favor men because they are designed around men's bodies or life patterns."

After establishing the definitional framework, constitutional boundaries and areas of concern, as noted above, three (3) original research sources were then employed - namely victim surveys, interviews with criminal justice role-players and court file case studies - to prove the assertion that biases were partly responsible for the inadequate facilitation of compensation payments to victims of sexual violence in criminal and quasi criminal forfeiture proceedings, thus leading to discriminatory outcomes. In this regard, bias was suggested as a leading factor for this omission because interviews and case studies in Chapters Seven confirmed that state role-players did not assist victims of sexual violence, who are mostly female, because they incorrectly believed the following: that their financial losses were not quantifiable; that they generally did not want or need compensation; and that they were not placed at a severe gendered financial disadvantage when compensation was not reviewed in relation to costs associated with attending court and post assault health services. Victim surveys in Chapter Eight undertaken for this thesis rebutted these unfounded assumptions and confirmed that: many sexual violence complainants were able to list quantifiable damages relating to both their court appearances, post-assault care and security/relocation expenses; some of these victims would accept compensation from offenders and the state; and modest amounts of compensation would be useful in addressing their unique gendered financial losses.

Furthermore, research conducted for this thesis also confirmed that the conduct of state attorneys, prosecutors and judges was also discriminatory when they overlooked the compensatory concerns of victims, partly on account of biases, for two reasons.

First, discrimination was evident as state officials ignored the unique vulnerabilities of sexual violence victims by not ensuring positive measures were in place to address their unique post assault compensatory concerns. More specifically state officials did not actively canvass readily available compensation avenues, nor did institutional overseers ensure mechanisms existed in this regard (such as performance monitoring) due to the

Also note that the two forms of equality referenced above, namely formal and substantive equality, were comprehensively discussed in subsection 1.2.

biases mentioned above and this in turn unnecessarily heightened the disadvantages that sexual violence victims' face, post-assault. This was so because compensation, if awarded, could have assisted these victims with their unique gendered financial losses in relation to court attendances, post assault medical care and security/relocation expenses.

Secondly, discrimination was also evident as other 'classes' of victims in South Africa were regularly provided with compensatory assistance (namely commercial crime victims and violent crime victims in general) in contrast to sexual violence victims who are predominately female. Again this favoritism occurred partly on account of the gender biases held by state officials who assumed that the gendered expenses of sexual violence victims, were superfluous and vague, as compared to the expenses incurred by other classes of victims. Also, once again, by improperly differentiating the entitlements afforded to various classes of victims they unnecessarily heightened the disadvantages that sexual violence victims' face, post-assault, because compensation, if awarded, could have assisted these victims with their unique gendered financial losses in relation to court attendances, post assault medical care and security/relocation expenses;

The above summation of how biases and discrimination disrupted the use of compensatory provisions, although helpful, does still require further elaboration. This is so because it is also important to show how the new factual assertions put forth throughout this thesis, when combined together, confirm the existence of bias, as one factor, that contributed to the lack of compensation being provided to victims of sexual violence, thus leading to a discriminatory outcome. In this regard it is asserted that the below five (5) new factual assertions, when combined together, do just that.

- First, case studies and interviews in Chapter Seven, along with victim surveys in Chapter Eight, confirmed that various 'classes' of victims in South Africa were provided with unequal compensatory prosecutorial and judicial assistance (namely sexual violence victims as compared to commercial crime victims and

violent crime victims in general). In this regard, interview data in subsection 7.1.1 confirmed that Sexual Offences Court magistrates in Cape Town, who oversaw 1172 sentencing proceedings, only saw fit to order compensation on 4 occasions. Furthermore, Sexual Offences Court prosecutors in Cape Town who worked on 742 sentencing matters only dealt with victim compensation on 9 occasions. The above two findings can be juxtaposed with interview findings from commercial crime prosecutors in Cape Town who confirmed that of the 65 successful convictions obtained from 2003 to 2005 a total of 40 cases involved compensatory orders at sentencing. Also, in the case study in subsection 7.2.6, prosecutors initially advised the author in writing that they could only assist commercial crime victims with their compensatory concerns in POCA forfeiture proceedings, and not victims of sexual violence, only to subsequently change this discriminatory policy position thereafter. Finally, in the court case studies in subsection 7.2 there was a biased decision making patterns and discriminatory outcomes when state role-players assisted violent crime victims in general by ensuring that their compensation arrangements were aligned to CPA sentencing orders, while conversely, in sexual violence cases, state role-players ignored the needs of victims and did not place compensation arrangements in the final correctional supervision orders and suspended sentences despite the fact that these agreements were used by offenders as mitigating circumstances to reduce their sentences.

- Second, interview data in subsection 7.1.1, confirmed that prosecutors and magistrates rarely assisted victims of sexual violence with their compensatory concerns in sentencing proceedings because, in part, they were under the misconception that financial losses in sexual violence cases were not quantifiable and these victims generally did not want or need compensation. Furthermore prosecutors dismissed the compensatory concerns of victims of sexual violence, on account of the above prejudicial assumptions, even though there were extensive prosecutorial directives (as summarized in subsection 5.5) that directed them to review the unique financial concerns of this specific vulnerable

class of victims. In addition, magistrates and judges also dismissed the compensatory concerns of victims of sexual violence despite the existence of constitutional imperatives, international human rights instruments and precedent case law, which implored them to review the financial needs of vulnerable victims of violent crime (as outlined in Chapter Two, Three and Five respectively). With the above in mind when state officials did not actively canvass readily available compensation avenues, due to the biases mentioned above, this unnecessarily heightened the disadvantages that sexual violence victims' face, post-assault. This was so because compensation, if awarded, could have assisted these victims with their unique gendered financial losses in relation to court attendances, post assault medical care and security/relocation expenses.

- Third, interview findings in subsection 7.1.2, along with case study data in subsection 7.2.3, confirmed that prosecutors and magistrates/judges in South Africa rarely vetted patriarchal customary law arrangements when they presented themselves in sentencing proceedings, to ensure that victims were not disadvantaged by such agreements, as these payments were often subsumed by male figures who negotiated these customary settlements. In addition, prosecutors and magistrates/judges rarely ensured customary financial agreements were included in suspended sentences and correctional supervision orders when case law precedent existed, in relation to violent crime, that such arrangements should be canvassed.⁵⁵¹ With this in mind, interview data in subsection 7.1.2, confirmed that prosecutors and magistrates rarely assisted victims of sexual violence with their compensatory cultural concerns because, in

⁵⁵¹ Note Terblanche's comments (2007: 176-177) regarding the reported case of *S v Maluleke* 2008 (1) SACR 49 (T) as it relates to the suitability of court oversight of customary compensation arrangements. The case involved the murder of a home intruder and Terblanche sums up the sentencing order as follows: 'at stake in this case was a traditional custom in terms of which she should send an elder member of her family to that of the deceased, as a token of an apology and a way to mend the relationship between the families... [upon which she would be sentenced to] eight months' imprisonment, suspended on condition that *inter alia* that she follow this custom.' Furthermore, Cowling (2008: 338) confirms that the affected 'community considered itself to be largely governed by African customary law... [and] overtures between the accused's and deceased's families had been made in accordance with customary traditions [so that the suspended sentence was in order].'

part, they were under the misconceptions: that financial losses in sexual violence cases were not quantifiable; that these victims generally did not want or need compensation; and that customary payments were outside of the courts' jurisdiction despite the severe gender imbalances that accompany such patriarchal agreements and despite the fact that these customary arrangements were cited by magistrates as mitigating reasons in which to reduce sentences. With the above in mind, when state officials did not properly vet and canvass customary compensation agreements, on account of the biases mentioned above, this unnecessarily heightened the disadvantages sexual violence victims' face, post-assault. This was so because customary compensation, if properly vetted, could have assisted these victims with their unique gendered financial losses in relation to court attendances, post assault medical care and security/relocation expenses.

- Fourth, victim surveys in Chapter Eight, and a Ministerial response to Parliamentary question (as outlined in subsection 5.3), confirmed that prosecutors rarely informed sexual violence victims of available government emergency social grants and court witness stipends, when offenders did not provide compensation, despite prosecutors' awareness that many complainant-witnesses have burdensome economic losses that directly relate to their gender, such as childcare, pregnancy and security costs. With the above in mind when state officials did not actively canvass readily available grants and court stipends, due to the biases, this unnecessarily heightened the disadvantages that sexual violence victims' face, post-assault. This was so because compensation, if awarded, could have assisted these victims with their unique gendered financial losses in relation to court attendances, post assault medical care and security/relocation expenses.

- Fifth, victim survey data in Chapter Eight confirmed that many sexual violence complainants can easily enumerate various quantifiable damages relating to both their court appearances and post-assault care, and that some of these victims would accept compensation from offenders and the state. With the above in mind when state officials did not actively canvass readily available compensation avenues, due to the biases, this unnecessarily heightened the disadvantages that sexual violence victims' face, post-assault. This was so because compensation, if awarded, could have assisted these victims with their unique gendered financial losses in relation to court attendances, post assault medical care and security/relocation expenses.

In addition to the above five (5) findings, which as stated previously, in combination prove biased decision making and discriminatory outcomes, research in this thesis also confirmed five (6) subsidiary conclusions.

First, indigenous customary compensation payments can greatly assist victims by providing them with money to attend to post-assault expenses. In this regard, in the case study in subsection 7.2.3 a prosecutor, defense attorney and magistrate who arranged a customary payment of R30 000 confirmed that this agreement 'will be her only chance or only break in her life.' Furthermore, victim surveys in Chapter Eight confirmed that many impoverished complainants were greatly assisted by customary payments. More specifically, in subsection 8.4 it was confirmed that numerous sexual violence victims had incurred debt to due post assault economic losses and that many of these victims employed non-state dispute forum mechanisms, or customary or community forums, to obtain financial redress. With the above benefits in mind this thesis therefore suggests that court role-players should better align these customary arrangements with criminal sentencing processes, prosecutorial mandates and post assault government benefits (as outlined in subsection 6.1.5). This would ensure that women and children have wider access to customary compensation payments and that customary arrangements will not be distorted by negative patriarchal influences (as noted in subsection 6.1.4) as they will be supervised and vetted by the courts. Also note

that, if this alignment occurs customary agreements could be incorporated into criminal sentences, and in addition, court witness stipends (and social grants) could better assist victims with money for cleansing ceremonies and customary damages so they are not unnecessarily tied to familial or community restitution processes that are often abused by male gatekeepers.

The second ancillary conclusion drawn from the research is that victims of sexual violence incur many post-assault expenses, in relation to their court appearances and post-assault treatment. In this regard, survey participants in Chapter Eight confirmed they incurred the following types of expenses, post assault: transportation, medical, telephone, property damage, emergency housing, security, employment disruption, school cancellation, counseling, child care, and legal fees. Furthermore, in subsections 8.4 and 8.5, it was made clear by survey participants that many impoverished victims often cannot attend post-assault government services, or ensure meaningful access to the criminal justice system, on account of financial obstacles relating to transportation costs and dependent care costs.

The third ancillary conclusion is that sexual violence offenders often have assets and money that can be subject to compensation orders or customary payments. In this regard, research in subsection 7.1.1 confirmed that many offenders were employed before sentencing and therefore they likely have savings that can be used to satisfy CPA compensation orders. Furthermore, in the victim survey findings in subsection 8.6, fourteen (14) of the thirty-five (35) survey participants who knew their offenders, indicated that the perpetrator had current or past employment income and/or access to assets, such as a home or car.

The fourth ancillary conclusion is that compensatory provisions and processes, in criminal and quasi-criminal forfeiture proceedings, can be easily arranged so as to assist victims, as they are informal and flexible. Moreover, research in Chapter Five confirmed that compensatory criminal processes, including procedures for the execution of orders and penalties for offender non-compliance, are beneficial because they are facilitated by state role-players, without cost to complainant, and when compensation is

ordered as a condition of sentence offenders may be incarcerated if they default on the payments. With the above benefits in mind, the case studies in subsection 7.2 confirmed the flexibility and informality of compensatory provisions, both in sexual and non-sexual violence matters, along with suitability of third party payments. For example, in Case Study Seven, when the offender did not have a bank account the court ordered that his car registration papers should be provided to the victim instead, after police confirmed the car ownership. In addition, in Case Studies Three and Eight, offenders borrowed funds from family and friends with prosecutors and the judiciary endorsing this approach. Finally, quantum was assessed in various cases on an ad-hoc basis, sometimes without quantification, and sometimes based on arbitrary foundations, such as the value of outstanding house bonds for a gunshot victim who could no longer afford these payments in Case Study Eight, or in the case of a sexual violence matter in Case Study Two for un-assessed future counseling losses.

The fifth ancillary conclusion is that state and offender impoverishment concerns in South Africa should not be used to pre-empt the provision of compensation to victims of sexual violence as other jurisdictions in the developing world have compensatory state and offender compensation schemes for victims of sexual violence and they have simply prioritized budgets and prosecutorial resources accordingly. More specifically, as reviewed in Chapter Four, there are numerous state compensation schemes in India and there are mandatory compensatory sentencing laws in Tanzania in cases of sexual violence.

Finally, the last ancillary conclusion is that constitutional precepts are offended when biases prevent compensation to victims of sexual violence. In this regard, research confirmed that compensation can reduce attrition rates in sexual violence prosecutions and therefore section 12 of the Constitution, regarding security of persons, is relevant. In this regard, compensatory criminal processes, alongside remedial emergency social grants, can reduce secondary victimization as many sexual violence complainants can remove themselves from abusive environments, or increase their security, with the assistance of state or offender compensation payments.

Also note that subsection 9(1) of the Constitution requires “equal protection and benefit of the law”⁵⁵² and this thesis suggests that although laws and policies are in place to assist victims of sexual violence with their compensatory concerns these laws/policies are rarely canvassed for this vulnerable group while other ‘classes’ of victims in South Africa are provided with abundant compensatory prosecutorial and judicial assistance, (namely commercial crime victims and violent crime victims in general). Bias was suggested as one of many factors leading to this discriminatory behavior because interviews and case studies undertaken for this thesis confirmed that state role-players did not assist victims of sexual violence with their compensatory concerns, even though laws and policies implored them to do so, because they incorrectly believed that their financial losses were not quantifiable and/or sexual violence victims generally did not want, or need, compensation. Victim surveys in Chapter Eight rebutted these unfounded assumptions and confirmed that many sexual violence complainants were able to list quantifiable damages relating to both their court appearances and post-assault care, and that some of these victims would accept compensation from offenders, or the government, and that modest amounts of compensation would be useful to these victims.

Also a second constitutional concern was identified in the empirical research conducted for this thesis when it was confirmed that prosecutors, judges and state-attorneys “indirectly” worsened the vulnerabilities of victims of sexual violence, who are mostly females, by neglecting their substantive equality rights in contravention of section 9(2) and (3) of the Constitution (which requires the state to “promote” equality and to desist from “unfairly discriminat[ing]”).⁵⁵³ This constitutional breach occurred indirectly as

⁵⁵² Constitution, section 9(1).

⁵⁵³ Constitution, subsections 9(2) and (3).

In addition, Albertyn and Goldblatt (2012:35-30) confirm that section 9(2) has been interpreted by the Constitutional Court to provide for a “substantive notion of equality” which requires the “dismantling... of systematic under-privilege” so as to “overcome a past characterized by deep social and economic inequalities, in which race, gender, and other patterns of exclusion and disadvantage structured access to, and enjoyment of, opportunities and benefits.” Moreover, in the words of Mosenke J, in *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC), 2004 (11) BCLR 1125 (CC) at paragraph 27, “the

state role-players, applying gender neutral laws and policies, disadvantaged women sexual violence victims by way of inaction and omissions mainly on account of the gender biases canvassed above (which again wrongly suggested women sexual violence victims did not want or need compensation nor did they have quantifiable losses).

More specifically, research found that these biases worsened the existing vulnerabilities of women when they confronted the criminal justice system, and when they sought out post assault health services, as readily available avenues of compensation (including the SRDG, CPA and POCA provisions and customary arrangements) were preempted outright on account of gender biases and these compensatory sources could have helped victims address their dire post assault access to justice and health predicaments. This second discriminatory outcome was not dependent on differential protection and benefit of the law so it did not offend subsection 9(1) of the Constitution, as the first discriminatory outcome noted above does, but rather discrimination was caused by the unnecessarily exacerbation of gender inequality for which the Constitution Court jurisprudence compels the state to act upon and “dismantle”.⁵⁵⁴ In this regard, victims of sexual violence, who are mostly women, face unique financial obstacles in pursuing post-assault justice and health care and this thesis asserts that the lack of attention to their financial predicaments, despite laws and policy directives imploring them to fully canvass compensatory provisions, was discriminatory. This was so because compensation could have meaningfully helped women victims and in this regard victim surveys in Chapter Eight confirmed that many victims did not avail themselves of free government psycho-medical services, nor did they fully engage the

substantive notion of equality recognizes that besides uneven race, class and gender attributes of our society, there are other levels and forms of differentiation and systematic under-privilege, which still persists [and] the Constitutions enjoins us to dismantle them and to prevent the creation of new patterns of disadvantage.”

Finally note that Albertyn et al. (2012:45 and 60) confirms that Constitutional Court jurisprudence suggest that section 9(3) “is capable of resulting in appropriate substantive equality analysis” although “a substantive interpretation of section 9 with regard to gender equality is not always understood or applied adequately by all of the judges of the Court.”

⁵⁵⁴ Mosenke J, in *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC), 2004 (11) BCLR 1125 (CC) at paragraph 27.

criminal justice system, on account of gendered economic barriers, such as concerns over child care costs or transportation expenses, that were clearly discriminatory in effect.

10.1 Final remarks

The issue of post-assault compensation for victims of sexual violence is indeed contentious as it necessarily requires placing a 'price tag' on a terrible life altering experience. Regardless, research on post-assault compensation is necessary as it can assist with understanding the financial barriers victims face when they wish to attend court and important post-assault health services. In addition, access to courts and post-assault care is a basic human right and Constitutional imperative as noted in Chapters Two and Three.

With the above in mind, it is asserted that role-player bias must be addressed in relation to victims' access to state and offender compensation. This is so because research in this thesis confirms that there are numerous avenues of state and offender compensation for victims of sexual violence that remain unused partly on account of the following biased assumptions held by many South African prosecutors and judges:

- Assertions that all sexual offenders are impecunious tsotsis⁵⁵⁵ and therefore compensation provisions which are tied to suspended sentences and correctional supervision orders should not be canvassed by prosecutors and judges in sentencing proceedings;
- Assertions that financial losses associated with sexual violence cannot be quantified⁵⁵⁶ by prosecutors and judges as this type of violence only involves a mere insult to the person when there is no visible physical injuries present;

⁵⁵⁵ Research undertaken in this thesis, and beyond, confirms this is an incorrect assumption. For example a Medical Research Council Policy Brief (2009) confirmed, after surveying 1738 households in the Eastern Cape and Kwa-Zulu Natal, that men who raped were likely to be educated and also likely to earn over R500 per month. Also note the survey findings in this thesis in subsection 8.6.

⁵⁵⁶ Participants who assisted with the survey in Chapter Eight noted numerous quantifiable losses including the following types: transport, medical, telephone, property damage/replacement, emergency housing, security, employment losses, school disruptions, counseling and childcare.

- Assertions that all victims of crime suffer the same indignities⁵⁵⁷ when they engage the criminal justice system so victims of sexual violence do not require special compensatory attention.

The author, throughout this thesis, rebutted all of these assertions. Also the author comprehensively reviewed constitutional provisions, legislation, regulations, departmental strategic plans, international human rights instruments, case law, and all of the other ‘nuts and bolts’ that the government of South Africa employs when addressing gender violence and the compensatory rights of victims of sexual violence. Put simply, there are ample laws and performance benchmarks that prosecutors and judges must abide by yet biases are so powerful they can circumvent all of these public protocols and obligations. Therefore it is important to ask, before concluding this thesis, one final question: Why would judges, magistrates, prosecutors, correctional officials, court administration staff and senior management in the DOJCD and NPA, act in a biased manner?

The answer is as follows. People and institutions bring the assumptions and beliefs which are held by the larger society, into their jobs and strategic mandates.⁵⁵⁸ With this in mind, there is widespread ignorance in society about the agency of women, the ordinariness of sexual violence offenders (be they priests, teachers, public servants or neighbors), and finally, the physical, emotional and financial costs of being raped.

⁵⁵⁷ It is asserted that sexual violence victims, who are mostly women and children, do have special compensatory needs and the intrusive treatment they receive when cooperating with criminal justice officials does set them apart from other victims. In this regard Doe (2004: 21), a Canadian rape survivor, confirms that ‘the massive amount of drugs that doctors administer during the gathering of the sexual-assault evidence kit, combined with the trauma of rape, can cause you to miss your period or otherwise mess with your menstrual cycle and make you feel unwell.’ Also, at 304, Doe notes that: ‘a doctor, usually male, gives you an internal to verify penetration and to capture any rape sperm. There is usually a good chance of this as no one has allowed you to pee. You stand on a sheet in the middle of a room. Hairs are removed from your scalp and plucked from your public area. Skin cells are scraped from your shin. Blood is taken from your arm. Saliva from your mouth. They give you massive doses of antibiotics and morning after pills that make you ill. Everything is put into a little box and put away, and you never see it again.... anyone would agree that the tests are invasive and intrusive. I can testify that they are experienced by women involved as a second assault.’

⁵⁵⁸ Other prominent feminists agree, such as Comack and Balfour (2004:184) when they note that ‘prevailing socio-political context[s] and discursive construction[s] based on gender, race and class inform [court role-players] case building work.’

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-APPENDIX 1-

Interview schedule (structured and unstructured Interviews)

and

Structured questions posed to prosecutors/magistrates (structured interviews)

University of Cape Town

Interview Schedule
(structured and unstructured Interviews)

- 1) Structured interviews with prosecutors took place in Cape Town's Sexual Offences Courts on the following dates:
 - 9th 11th 23rd 24th 25th 30th May 2006
 - 7th 9th June 2006
- 2) Structured interviews with magistrate took place in Cape Town's Sexual Offences Courts on the following dates:
 - 18th 24th 26th 30th 31st May 2006
 - 1st 7th June 2006
- 3) Structured interviews with High Court role-players took place in Cape Town's High Court on the following dates:
 - 27th March 2006
 - 6th September 2006
- 4) Unstructured interviews with commercial crime prosecutors took place in Cape Town's Commercial Crime Court on the following dates:
 - 11th January 2006
 - 15th March 2006
- 5) Unstructured interview with a SANCO community leader interview took place in Cape Town on the following date:
 - 17th July 2006
- 6) Unstructured interview with a family mediator, who intervened in a sexual violence matter, took place in Cape Town on the following date:
 - 22nd February 2006
- 7) Unstructured interviews with corrections officials took place in Cape Town's Correctional Supervision Offices on the following dates:
 - 3rd April 2006
 - 31st August 2006
- 8) Unstructured interviews for the case study in subsection 7.2.3 took place in Cape Town's Sexual Offences Courts on the following date:
 - 12th May 2006
- 9) Unstructured interviews for the case study in subsection 7.2.7 took place in Cape Town's Regional Court on the following date:
 - 23rd March 2006

QUESTIONS FOR PROSECUTORS AND MAGISTRATES/JUDGES

Issues relating to compensation for victims of sexual violence

Bryant Greenbaum B.A., LL.B., LL.M, Ph.D. Candidate (UCT)

NOTE: *The below questions will guide the interview. Your answers will be recorded and transcribed. You agree to the public release of your identity, recording and transcription.*

1) Are you working in a **SOCA unit** or outside a SOCA unit or as **Magistrate** or **Judge**?
If yes, for how long?

2) How many sexual sentencing matters have you dealt with in the past on a yearly basis?

3) Have you been assigned to a sexual assault or indecent assault matter where you, the Prosecutor or the Judge/Magistrate, addressed the issue of victim compensation?

4) Have you been assigned to a criminal matter where you, the Prosecutor or the Judge/Magistrate, addressed the issue of victim compensation?

5) Have you been assigned to a sexual assault or indecent assault matter where you informally dealt with the compensation needs of the victim?

-Examples include the following informal customary practices: arranged marriages (baleka/twala), polygamy, lobolo, payment for a cleansing ceremony, damages for adultery and religious rituals.

-Examples include other legal procedures such as: maintenance orders, the Child Care Act, the Domestic Violence Act, bail conditions, diversion conditions, plea and sentence agreements, discontinuances, withdrawing cases.

6) Compensation orders are common in commercial crimes courts but not sexual offences proceedings - Can you provide your insights into why Courts rarely order compensation in sexual offences cases?

-APPENDIX 2-

Documents relating to Case Study Seven (subsection 7.3.7)

A civil forfeiture court case in the
High Court of South Africa (Cape of Good Hope Provincial Division)

University of Cape Town

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Asset Forfeiture Unit



The National Prosecuting Authority of South Africa
Igunya Jikelele Labetshutshisi baMzantsi Afrika
Die Nasionale Vervolgingsgesag van Suid-Afrika

Our ref: Adv E D Baartman

16 August 2006

Mr Greenbaum
CAPE TOWN

Dear Mr Greenbaum

NDPP v BRAUN – CASE NUMBER 220/2006

I refer to your meeting of 28 June 2006 with members of the Asset Forfeiture Unit and correspondence in this matter. I sincerely apologise for the delay in responding to you. The matter was taken up with our head office to obtain guidance on how we ought to respond to the issues you raise.

I wish to again express our appreciation for the active interest you have shown in this matter. We have considered your view that the minor complainants in the related criminal proceedings may have an interest in the property currently under preservation in the matter of the NDPP v Braun.

As discussed with you, our office instituted proceedings in terms of chapter 6 of the Prevention of Organised Crime Act, Nr 121 of 1998 ("POCA"). Chapter 6, and in particular applications involving property as an instrumentality of crime, makes no provision for compensation for victims that have suffered loss or damage as a result unlawful activity.

We have in the past however, where possible, made arrangements with victims who have suffered financial loss as a result of criminal activity, to achieve some compensation for victims. However, these cases are limited to situations where the loss is reasonably easily quantifiable and there are no material disputes about whether the victim is liable to compensation and what the quantum of compensation is. This process in any event usually requires the agreement of all the party's involved, with the ultimate sanction of the court. We have also only been involved in arrangements of this nature in cases involving the proceeds of crime and not instrumentality cases.

Justice in our society, so that people can live in freedom and security

It is unfortunately the view of the National Prosecuting Authority ("NPA") that we are not in a position to pursue compensation for victims who have suffered damages or non-pecuniary loss, as the POCA was not designed to prosecute such claims. As a statutory body, the NPA is required to act within the framework of the statutory authority given to its members. In the circumstances therefore we are constrained to provide the kind of assistance you suggest.

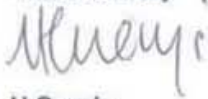
The ability to compensate victims of violent crimes that cause physical and emotional damage, is a serious concern of the government and is currently the subject of a Law Reform Project. It is hoped that this will result in a more satisfactory legislative framework within which to deal with matters such as this.

POCA does also currently provide that funds paid into the Criminal Assets Recovery Account ("CARA"), can be made available to organisations who provide support to the victims of crime. This may be an avenue you wish to explore.

A further alternative would also be to contact the Legal Resources Centre to explore any other legal avenues open to the minor complainants.

We remain open to discussions on a way that we can assist the victims in this matter, provided these proposals can be accommodated within the legal framework governing the NPA or the POCA.

Yours faithfully



H Cronje

**Regional Head
Asset Forfeiture Unit
Western Cape**

DELIVERED BY HAND

25 February 2008

TO: Asset Forfeiture Unit

TO: The Centre for Child Law

TO: Werner Braun

TO: Villabraun (Pty) Ltd.

Dear Sirs/Madams:



**RE : The National Director of Public Prosecutions and Werner Braun,
Villabraun (Pty) Ltd., Case number 220/2006 and/or 11244/2006, in the
High Court of South Africa (Cape of Good Hope Provincial Division)**

I have been in contact with some of you as the attached communications confirm. My contact previously and to date is as a member of the public concerned with the care of sexually abused and exploited children in general and the affected children in the above noted civil matter (even though I have never contacted the affected children or their guardians in Case number 220/2006 and/or 11244/2006).

My initial involvement in this matter is outlined in the attached un-sworn and undated affidavit that I emailed to Elizabeth Baartman, of the National Prosecuting Authority, on 5 June 2006. **This affidavit is attached as Appendix #1.** In this affidavit I asserted that I was of the opinion that "the minor complainants [in Case number 220/2006 and/or 11244/2006] had certain legal entitlements with regards to the property that is the subject of this current Application and the minor complainants may require legal representation to ensure their interests were reviewed." I asserted the foregoing without having contacted the affected children or their guardians, but with the notion that the affected children in forfeiture applications could possibly issue civil processes that would crystallize their rights within the forfeiture proceedings.

Subsequently the Asset Forfeiture Unit, by way of the Western Cape Regional Head H Cronje, responded to my above assertion in a letter dated 16 August 2006 wherein she stated that "we remain open to discussions on a way that we can assist the victims in this matter" but "Chapter 6, and in particular applications involving property as an instrumentality of crime, makes no provision for compensation for victims that have suffered loss or damage as a result of unlawful activity." **This letter is attached as Appendix #2.**

Subsequently, I engaged the Centre for Child Law to assist in ensuring the affected children/guardians were made aware of their legal rights and if they wanted to pursue them to assist them in this regard. It was my understanding that the Centre for Child Law was going to ensure the affected children's interests were canvassed until such time as they entered these proceedings as Amicus. See the related communications attached as **Appendix #3 (provided to me via email by A. Skelton) and #4.**

Subsequently, after being informed the Centre for Child Law would not be looking after the interests of the affected children I contacted other service providers for assistance. **See related communications attached as Appendix #5.**

I also engaged the Human Rights Commission. **See related communications attached as Appendix #6 and #7.**

At this time I have been unable to obtain legal, social worker or police assistance to locate and approach the parents of the affected children in Case number 220/2006 and 11244/2006 to advise them of their children's legal entitlements and to make representations to the NPA pursuant to their 16 August 2006 letter. Also, at this time I am not aware if the parents of the affected children have been advised of their legal rights and entitlements or have contacted the NPA about the same.

I assert that the Court in Case number 220/2006 and 11244/2006 should be made aware of the particulars of this letter, and the Appendix attachments. This is in light of section 28(1)(h) of the Constitution, which prescribes that:

“...every child has the right to have a legal practitioner assigned to the child by the state, and at the state expense, in civil proceedings affecting the child, if substantial injustice would otherwise occur.”

Thank you,



Bryant Greenbaum B.A., LL.B., LL.M., Ph.D. Candidate (University of Cape Town)
202 Lingen Gardens
Camp Street
Cape Town
8001
(082) 225-0122

CAPE TOWN
Regional Office

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Fax: +27 21 487 7083

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Cape Town
8001

P/Bag X9120 or P/Bag X9003

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South Africa

Docex:
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Cape Town

Email:
hcronje@npa.gov.za
www.npa.gov.za



Asset Forfeiture Unit



The National Prosecuting Authority of South Africa
Igunya Jikelele Labetshutshisi boMzantsi Afrika
Die Nasionale Vervolgingsgesag van Suid-Afrika

Our ref: HT Cronjé
Your ref:

24 April 2008

Mr B Greenbaum
202 Lingen Gardens
Camp Street
CAPE TOWN
8001

BY HAND

Dear Mr Greenbaum

**THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS v
WERNER BRAUN, VILLABRAUN (PTY) LIMITED**

Your letters dated 25 February 2008, and 3 March 2008, 10 April 2008 and 21 April 2008 have reference.

As I have indicated to you on numerous occasions in the past, in writing and in person, as public servants, we are required to act within the confines of the law and are accountable for fulfilling our mandate.

In this regard, I wish to reiterate that the purpose of the asset forfeiture proceedings currently before the High Court is to remove property, which is believed to be an instrumentality of an offence, from the owner thereof. The mandate of the AFU in this regard is to ensure that the property, to which the application relates, is not again used to commit similar offences against children.

It is the responsibility of the AFU to ensure that all relevant information, justifying forfeiture of the property, is brought to the attention of the court considering the matter. This we believe we have done. The Child Law Centre has also approached the court as *amicus curiae* to place additional information they believe to be relevant before the court. We have supported their application. If you believe that we have failed in

Justice in our society, so that people can live in freedom and security

our duty to the court you may likewise approach the court to intervene in the proceedings.

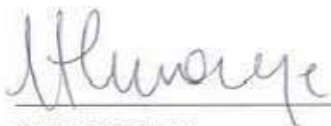
You allege in your correspondence that “the AFU may have obligations to inform the children of their legal entitlements”. As I have stated above and on numerous occasions in the past, the responsibility of the AFU begins and ends with ensuring that relevant evidence is placed before a court to assist it in determining whether the provisions of chapter 5 and 6 of the Prevention of Organised Crime Act No. 121 of 1998 have been met. Our focus is ensuring accountability on the part of the perpetrator of the crime.

The children do potentially have a civil claim for damages against Mr Braun, based on any harm suffered as a result of his actions. However it is not the mandate of the AFU to pursue such claims on behalf of the children. The unit is not equipped with either the legislative mandate or the resources to pursue this objective.

We will certainly request the investigating officer in this matter to advise the victims of their rights. We will also request that he refer them to a social worker in the area to assist them in pursuing their claims should they wish to do so.


We now consider the matter closed.

Yours faithfully



HT CRONJE
REGIONAL HEAD
ASSET FORFEITURE UNIT

RECEIVED
2008-06-09

To forward to Judge Motola who has received judgment on case no. 11244/2006. 

Please complete Section 1 and 7, and any other Section(s) that apply to your complaint. It would assist the Society if you would attach all relevant documentation.

Cape Law Society 29th Floor ABSA Centre, 2 Riebeeck Street, CT, 8001, Docex 124 CT 021-443-6700 email cls@capelawsoc.law.za

COMPLAINT SUBMISSION FORM

Section 1

Full name(s) and surname: Bryant Leslie Greenbaum

Identity Number: Canadian Passport #JX172739

Postal address: 202 Lingen Gardens, Camp Street, Gardens, Cape Town

Postal Code: 8001

Telephone (home): 082-225-0122

Name of attorney against whom complaint is lodged:
M Kagee, State Attorney

Name of attorney's practice: State Attorney, Cape Town Office

Name and place where attorney practices:
4th Floor, Liberty Centre, 22 Long Street, Cape Town

Date when you gave instructions to your attorney?
The State Attorney's client, namely the National Prosecution Authority's (NPA) Asset Forfeiture Unit (AFU), has corresponded with me in writing on two occasions, on 16 August 2006 and 24 April 2008 (*correspondence attached*) regarding a present court matter for which I have engaged in as a concerned member of the public and a legal researcher. The Court matter is the National Director of Public Prosecutions and Werner Braun, Villabraun (Pty) Ltd., Case number 220/2006 and 11244/2006 in the High Court of South Africa (Cape Hope Provincial Division). I have replied to both the AFU and their representative the State Attorney questioning their positions thereto and claiming that both the AFU and the State Attorney are in a conflict of interest situation with my last correspondence sent 29 April 2008 clearly outlining my positions (*correspondence attached*). No further reply has been received from the AFU or the State Attorney regarding my claim of a conflict of interest.

Briefly describe what action you instructed your attorney to take, and against whom:
In AFU correspondence to me dated 16 August 2006 and 24 April 2008 it is confirmed that the AFU, and therefore by association their representatives, the State Attorney: "remain open to discussions on a way that we can assist the [child] victims in this matter" and "we will certainly request the

Copy
DATE

2008-06-09
CAPE BAR COUNCIL
CAPE LAW SOCIETY
KAAPSE BALIERAAD



9 JUN 2008



the doj & cd

Department
Justice and Constitutional Development
REPUBLIC OF SOUTH AFRICA

HIGH COURT: CAPE TOWN

Private Bag X 9020, CAPE TOWN, 8000 • 35 Keerom Street, CAPE TOWN
Tel (021) 480 2635, Fax (021) 423 9412

MEMORANDUM

TO: Hon Mr Justice Motala

FROM: Ms R M David

SUBJECT: Case No: 11244/06

REFERENCE: 1/4/18

DATE: 09 June 2008

Mr Bryant Greenbaum has requested that we place this on the court file for your perusal.

He has also requested that he be contacted when the reserved judgment is handed down as he is an interested party in this matter. He can be contacted at 082 2250 122.

Yours faithfully

Ms R M David
Chief Registrar
High Court, Cape Town



CAPE LAW SOCIETY

Incorporated as The Law Society of the Cape of Good Hope
THE STATUTORY BODY WITH JURISDICTION TO ADMINISTER THE ATTORNEYS'
ACT IN THE NORTHERN, WESTERN & EASTERN CAPE PROVINCES



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TELEPHONE (021) 443 6700
TELEFAX (021) 443 6751/2
EMAIL cls@capelawsoc.law.za
Website www.capelawsoc.law.za

Mr B L Greenbaum
202 Lingen Gardens
Camp Street
Gardens
CAPE TOWN, 8001

Please quote our reference in all correspondence

Our Reference: 41005/Kagee/BSM/dt

Your Reference:

Date: 9 July 2008

Dear Sir

Complaint against Attorney Mr M T Kagee (State Attorneys Office)

Thank you for your letter, which was received on 20 June 2008.

Your complaint has been put to the attorney concerned for a full report, which must be delivered to us by **7 August 2008**. Upon receipt of that report, a copy will be sent to you for your comments.

Should the report not be received within the period stipulated, a reminder will be sent to the attorney and you will be informed thereof.

Please therefore await further communication from us.

Yours faithfully


B S MKUMATELA
LEGAL OFFICER
DISCIPLINARY DEPARTMENT

Director: Nalini Gangen
Senior Officers: Frank Dorey (Disciplinary), Caron Jeaven (Administration),
Michél Botha (Professional Affairs), Glenn Flatwell (Trust Accounting)

**The State Attorney
Die Staatsprokureur
iGqweta IikaRhulumente**

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8000

TEL (021) 441-9200
FAX (021) 421-9364

My Ref/My Verw/saathiso sam:
M. Kagee

Your Ref/U Verw/saathiso sakho
Mr. Mkumatela

11 September 2008

**BY HAND
PER HAND**

CAPE LAW Society

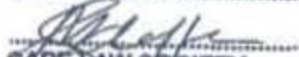
Absa Centre

Cape Town

Copy received

DATE: 11 SEP 2008

Dear Mr. Mkumatela


CAPE LAW SOCIETY

RE: INVESTIGATION IN RULE 15 OF ALLEGED PROFESSIONAL MISCONDUCT

I had previously gone into detail as to why the civil forfeiture application is not the appropriate venue to address any potential civil claims of the victims. I also do not think that the appropriate venue to discuss legal arguments of these kinds is through the Law Society. Rather, I request the Law Society to simply make a determination on whether or not I acted in an improper manner.

However, for purposes of clarity I will briefly respond to the allegations made by Greenbaum in the various sections of his response. Please note that my section numbers correspond with the section numbers used by him.

1) The AFU was under no obligation to give Greenbaum written confirmation that the children's potential civil claim is satisfied from the proceeds of the sale of the property if it is forfeited

Mr. Greenbaum is not remotely connected to either these forfeiture proceedings or to the victims of the perpetrator of the alleged offences. Accordingly, my client was under no obligation to give Greenbaum any written confirmation of this fact or how we could potentially execute this option.

In addition, no such guarantee could be made as my client has not obtained a forfeiture order at present and therefore we cannot make decisions with regard to what will happen with the property at present. However, I can state on record that the AFU has no objection in the case of a forfeiture order being granted to use the proceeds of the sale of the

2

property to pay the victims if they are successful in obtaining a civil judgment against the perpetrator. The remainder of this section has already been dealt with extensively in my previous letter and I accordingly will not deal with it again. I accordingly state that Greenbaum was not entitled to any such written confirmation and I therefore admit that my client did not provide it to him.

2) The NPA only attempts to return property to victims in cases when they have been deprived of the property by the perpetrator and there claims can therefore be easily ascertained and quantified

The quotations mentioned by Greenbaum have only been applied in cases involving forfeitures of the proceeds of unlawful activity. In such cases the damage the victims have suffered is an easily ascertainable and quantifiable amount of financial loss. This is in fact directly implied in the first quotation of Greenbaum. The 2003-2004 NPA Annual Report continuously uses the words "returned to victims". This implies returning something which was taken from them. In cases such as the present we are dealing with property which is an "instrumentality of an offence". Accordingly, the victims have not been deprived of any property and therefore the NPA cannot offer restitution to victims if such claims cannot be easily ascertained or quantified.

In this regard you may have regard to the judgment of *National Director of Public Prosecutions v Rebutzi 2002 (2) SA 1 (SCA)*. In this case it was argued that the legislature could not have intended a confiscation order in terms of POCA to be made where there was an identifiable victim who had a claim for recovery of the proceeds of the crime. Otherwise, the realisation of the defendant's assets in satisfaction of the confiscation order would deprive the victim of the means of satisfying his claim. The court however rejected this contention and stated that

"A court is not precluded from making a confiscation order merely because the victim of the crime has a claim for recovery of the proceeds nor is that a consideration that needs even to be weighed when it exercises its discretion".

The court then went on to state

"The legislature did not intend a confiscation order to be withheld merely because an identifiable victim has an equivalent claim for recovery of his loss."

The above case was one in which the victims claim was easily quantifiable and the NPA supposedly could have paid them back the proceeds of unlawful activity. However, the SCA found that a confiscation/forfeiture could not be withheld because of the existence of victims who would be deprived of their claim when the confiscation/forfeiture was granted. I accordingly state that Greenbaum has misunderstood the sections he has quoted and accordingly there is no merit in any of his submissions under this section.

3) The courts have never interpreted the words "interest" to include potential claims by victims in "instrumentality cases"

-APPENDIX 3-

Victim Survey template and comprehensive survey findings

University of Cape Town

SENTENCING AND COMPENSATION SURVEY
Research Project - Bryant Greenbaum 082 225 0122

NOTE: Counselors, please fill in the front page of this survey using information in the client's file

INFORMATION ABOUT INTERVIEW

Date of interview: _____
Location of Interview: _____
Counselor's name: _____

INFORMATION ABOUT SURVIVOR AND THE ASSAULT(S)

Identity Number of Survivor (i.e. OB1, KH1, MA1): _____
NOTE: Please keep separate lists at each office with Survivors' details including full name, date of birth and corresponding identity number

Relationship of Perpetrator to Survivor (i.e. Stranger, Relative): _____

Number of Incidences involved: _____

Age of Perpetrator (if known): _____

Age of Survivor at time of assault: _____

Date of Birth of Survivor: _____

Was assault reported to the Police or other Criminal Justice official? _____

If assault reported, what was the outcome? _____

Was compensation received and what was the amount? _____

INTRODUCTION - TWO PURPOSES OF THE SURVEY

A) We are conducting this research to find out what survivors' think is the appropriate punishment for perpetrators of sexual violence. We want the courts and the prosecutors to be more aware of what survivors want as punishment for perpetrators when they are sentenced by the judge.

B) We also want to find out if survivors have expenses or costs because of the rape, which convicted perpetrators could pay for. Currently, survivors are not obtaining money from convicted perpetrators when they are sentenced. However, the criminal courts can use existing laws to make convicted perpetrators pay compensation if they have money or assets. We want to convince judges and prosecutors to use these laws so that survivors can get compensation for the money that they had to spend due to the rape.

YOUR PARTICIPATION IN THIS SURVEY

- A) To participate in this survey you must be 18 years of age or older.
- B) Your participation in the survey is voluntary and you have the choice to participate.
- C) At any time during the survey, if you do not feel comfortable continuing, you can stop without providing an explanation or reason why you no longer wish to continue.
- D) The counselor that is assisting with this survey will explain each question and then the counselor will write the answers onto the survey.

E) It may be very difficult to think about the assault and the losses you experienced after the assault. If you feel you are not ready to confront these issues now you should NOT take part in the survey. However we feel that it could be helpful to discuss these issues with your counsellor and your counselor is available for this purpose.

F) Your name and any details that could identify you will NOT be used in this research, but some of the comments you make may appear in the final public report.

RESULTS OF SURVEY

A) If you agree to participate, we will use your answers to try to make it possible for survivors, in the future, to obtain compensation for the money that they have had to spend due to the assault.

B) It may not be possible to obtain compensation in your specific case because the courts rarely use the compensation laws to assist survivors of sexual violence. BUT, if the perpetrator has money or assets, and the court finds him guilty, we can try to obtain compensation for you by writing a letter to the criminal court to ask that you receive compensation from him. We cannot make any promises about compensation as the court decides if it is appropriate.

Signature of Participant _____ Date _____

University of Cape Town

PART ONE - OPINIONS OF PARTICIPANTS

A) Punishment

If you could decide, what punishment do you think the perpetrator deserves? (This may include options besides sending the perpetrator to prison).

Note the spontaneous response:

Counsellor: Prompt a response if necessary by suggesting other forms of punishment besides prison, such as apology, make amends, public statement or compensation.

B) Expenses

Have you had to spend any money because of what the perpetrator did to you?

YES () or NO ()

If so, would you want the perpetrator to pay you back for this?

YES () or NO ()

If you said NO above, would you change your mind if it was possible for the perpetrator to pay the money to you through the court, so that you do NOT have to see him or speak to him?

YES () or NO ()

C) Perpetrator's Property

Do you think that the perpetrator has some money available to pay your costs? Why do you think this? (Does he own a car, house, business, have a job etc.)

PART TWO – EXPENSES AND COSTS INCURRED

In this section, we want to find out about the expenses that the survivor has incurred as a result of the assault.

Did you have to pay for any of the following things after the sexual assault?

Did the government assist or help pay for any of these costs?

For example: Did the Prosecutor give you money to pay for your transportation to court?

| Item | Amount | Comments/ Did government assist? |
|---|--------|-------------------------------------|
| <p>1) Childcare costs because you could not take care of your children due to your injuries OR because you had to go to the court, police, counseling or hospital. <i>How many days did you pay for childcare? How much did it cost per day?</i></p> | | |
| <p>2) Lost income or pay because you had to take time off work. <i>What is your weekly salary and how many weeks were you absent from work? Did you have to take vacation or paid leave?</i></p> | | |
| <p>3) Medical and prescriptions costs as a result of the assault, including any expenses associated with HIV/AIDS.</p> | | |
| <p>4) Counseling costs for yourself OR family members who were upset because of the assault. <i>How many visits? How much did each visit cost?</i></p> | | |

| | | |
|--|--|--|
| <p>5) Property replacement or property damage costs if property was destroyed or taken during the assault including clothes, doors locks, or furniture.</p> | | |
| <p>6) Security costs to make you feel safer and improve your security.</p> | | |
| <p>7) Unplanned pregnancy costs for termination or abortion expenses, childbirth costs and maintenance payments</p> | | |
| <p>8) Emergency housing costs if you had to move out of home because of the assault. <i>List monthly rental costs and other costs due to the move (moving expenses, furnishings etc.)</i></p> | | |
| <p>9) Cancellation of school fees or other services if you can no longer attend due to illness (if refund not available).</p> | | |
| <p>10) Transportation costs to court, hospital, counseling, childcare or to find new housing. <i>List the cost of transport per category and the number of times you attended</i></p> | | |
| <p>11) Telephone costs to arrange childcare, court appointments, doctors' appointments and any other services needed as a result of the assault. <i>List approximate daily telephone costs for each service or appointment.</i></p> | | |
| <p>12) Other costs</p> | | |

13) If you answered NO earlier, confirming that you did NOT want the perpetrator to pay you for your costs, what is your opinion now, after reviewing the above expenses?

PART THREE – OTHER FORMS OF JUSTICE

A) Were any of these other forms of justice used in your case (if yes, please indicate which one)?

- Meetings between the families of the perpetrator and survivor
- Street Committee
- Community Court
- Chief's Court
- Vigilante Group
- Religious institution
- Internal Disciplinary Procedure at place of employment
- CCMA

B) If YES, please give details and describe how was the perpetrator punished and if any compensation was given to you?

C) How did you feel about this process and the punishment that was given?

PART FOUR – ENDING SURVEY

Make it clear to the participant that currently, compensation from the perpetrator is rarely ordered to survivors by the criminal courts in sexual assault cases. We are trying to change that, but it is not likely that participants in this survey will be given compensation. HOWEVER, we can write a letter to the court to assist a survivor with their request for compensation from the perpetrator. We cannot make any promises, as the court decides if compensation is appropriate.

Remind the participant that if the perpetrator has NO income or assets, then compensation will NOT be possible and for those cases we must try to convince the government to make public funds available to survivors.

Ask if she would like to see the research findings when it is completed, explain that it may take a long time and find out the best way to get her a copy if she wishes to obtain one.

Thank her for participating.

Detailed Survey Findings

- 1) Participants' Transportation losses
- 2) Participants' Medical/medications losses
- 3) Participants' Telephone losses
- 4) Participants' Property replacement/damage
- 5) Participants' Emergency housing losses
- 6) Participants' Security losses
- 7) Participants' Employment losses
- 8) Participants' School losses
- 9) Participants' Counseling losses
- 10) Participants' Childcare losses
- 11) Participants' Miscellaneous losses

University of Cape Town

1) Transportation losses

Of the thirty-six (36) participants who identified economic loss(es), thirty-four (34) participants identified transportation related economic loss(es).

Of those participants that noted Rand transportation related expenditures (as some participants did not provide Rand/monetary estimates):

- Nineteen (19) participants had estimated expenditures of under 100.00 Rands;
- Five (5) participants had estimated expenditures of between 100.00 Rands and 400.00 Rands; and,
- Four (4) participants had estimated expenditures of over 1,500.00 Rands.

Furthermore, the following number of participants specified the following types of transportation economic losses (note that some participants identified more than one type of transportation economic loss, for example transportation to counseling *and* transportation to move homes):

- Twenty-two (22) participants identified transportation to medical service providers as economic losses and two (2) participants identified transportation losses for a support person to assist them when attending medical service providers as economic losses;
- Thirteen (13) participants identified transportation to counseling service providers as economic losses;
- Seven (7) participants identified transportation for court related reasons as economic losses and one (1) participant identified transportation for a support person to assist them when attending 'court' as an economic loss;
- Four (4) participants identified transportation economic losses due to a sudden move to new residences and/or emergency housing/shelters and one (1) participant identified transportation for their dependants when moving to 'emergency housing/shelters' as an economic loss;
- Two (2) participants identified transportation to a doctor as economic losses;
- Two (2) participants identified transportation to a prosecutor and a lawyer as economic losses;
- One (1) participant identified transportation to cancel schooling as an economic loss;
- One (1) participant identified transportation to a psychologist as an economic loss.

The foremost mentioned transportation concern of the participants was related to attending medical related services, with or without a support person. In this regard, many of participants had medical transportation economic losses related to their numerous follow-up appointments at the Thuthuzela Care Centre after their initial emergency attendance at the Centre following the sexual assault. In addition, many of the participants identified these transportation costs to the Thuthuzela Care Centre, for the above noted reason, as their only economic loss. This is consistent with Rasool et al's findings in the *Violence against Women, a National Study* wherein it is noted that 'the main concern for survivors of sexual abuse was contracting a sexually transmitted disease or HIV/AIDS.'⁵⁵⁹ In addition, Rasool et al confirm that 'the lack of transport [due to financial constraints or availability] was the most common reason' for 'a delay between the time of abuse and the time that women sought medical assistance' and this 'lack of transport' was one of the 'main reasons given for delayed [district surgeon] examinations.'⁵⁶⁰

After medical transportation costs, counseling transportation costs were the most frequently cited travel expense of the participants. Counseling transportation costs, similar to transportation costs related to medical services, are repetitive and burdensome and unfortunately counseling organizations are not properly resourced to assist with travel subsidies for their clients to attend their services. In this regard, Budlender and Kuhn, in their survey of civil society organizations, of which most were counseling providers, entitled *Where is the Money to Address Gender-Based Violence?* confirm that organizations 'identified salaries, volunteer stipends, general office, administration and running costs as budget items for which it was more difficult than previously to raise funds' [and] 'these were identified as their most important expenses.'⁵⁶¹ Regrettably, if these core expenses are not being sufficiently attended to by funders, despite their prioritization and importance, then client travel allowances are unlikely to be reviewed or attended to in the near future.

⁵⁵⁹ Rasool et al (2002: xvi).

⁵⁶⁰ Rasool et al (2002: xvii).

⁵⁶¹ Budlender and Kuhn (2007: 25).

Lastly, turning to court related travel costs, these expenses were the third most common transportation economic loss for the participants. In this regard, the Public Service Commission's *Citizen Satisfaction Survey* states that 29% of court users, surveyed in 42 magistrates courts throughout the country, 'had to travel for a long time' to attend criminal proceedings.⁵⁶² This confirms that transportation expenses can be repetitive and burdensome, and as noted previously, on many occasions, witnesses and victims are not informed of court transportation subsidies, to their financial detriment.

University of Cape Town

⁵⁶² Public Service Commission (2005:16).

2) Medical/medications losses

Of the thirty-six (36) participants who identified economic loss(es), twelve (12) participants identified medical-related economic loss(es).

Of those participants that noted Rand medical related expenditures (as some participants did not provide Rand/monetary estimates):

- Two (2) participants had estimated expenditures of under 100.00 Rands;
- Three (3) participants had estimated expenditures of between 100.00 Rands and 400.00 Rands;
- Two (2) participants had estimated expenditures of between 401.00 Rands and 1,000.00 Rands;
- One (1) participant had estimated expenditures of between 1,001.00 Rands and 5,000.00 Rands; and,
- Two (2) participants had estimated expenditures of above 10,000.00 Rands.

Furthermore, the following number of participants specified the following types of medical economic losses (note that some participants identified more than one type of medical economic loss, for example costs for doctor *and* for medications):

- Four (4) participants identified doctor related economic losses.
- Three (3) participants identified surgery/operations related economic losses and two (2) participants identified continuing medical service related economic losses;
- Three (3) participants identified medication related economic losses and one (1) participant identified continuing medications related economic loss;
- One (1) participant identified economic loss relating to injury;
- One (1) participant identified economic loss relating to hospital;
- One (1) participant identified economic loss relating to psychiatric care;
- One (1) participant identified economic loss relating to spectacles;
- One (1) participant identified economic loss relating to anti-depressant;
- One (1) participant identified economic loss relating to vitamins; and,
- One (1) participant identified economic loss relating to vaginal cream.

With regards to the participants' responses within this category of losses, it is noted that the following disconfirming evidence or non-uniform results existed:

- The participants did not mention the use of traditional medicines or doctors. This discrepancy could be due to transportation barriers. In this regard, the Department of Transport's report *National Household Travel Survey 2003, Key Results* confirms that 'the only services which a significant proportion of households claim are inaccessible are traditional healers and tribal authorities [as] these would not be expected to be generally accessible to people living in metropolitan and urban areas and commercial farmland.' ⁵⁶³
- Some of the participants suffered serious physical injuries due to gunshot wounds or knife injuries and therefore have substantial ongoing expenses to treat those injuries, thus they identifying large average Rand estimates in terms of medical-related economic losses.
- The issue of medical insurance was not fully canvassed in the survey, so it is unclear how prevalent medical aid coverage was and the extent of that coverage. By way of background, one participant noted that she 'maxed out two different medical aids' leaving her personally responsible for some past and continuing medical expenditures. Furthermore, it is noted in the projections in the Western Cape Department of Health's *Comprehensive Service Plan for the Implementation of Health Care 2010* report that 99% of Khayelitsha residents are uninsured as opposed to less than 50% of the residents from the Northern, Western and Southern Cape Town Metro Districts. ⁵⁶⁴
- The majority of the survey participants were treated at the government Thuthuzela Care Centre so there were no direct medical costs for immediate post rape medical care but as mentioned previously there were burdensome transportation economic losses related to attendance at the Centre for treatment.

⁵⁶³ South Africa. Department of Transport (2005: 5)

⁵⁶⁴ Western Cape. Department of Health (2007: 15)

Still, the Western Cape Department of Health's *Comprehensive Service Plan* report notes that 'for [medical] services to be defined as 'accessible' the maximum distance that the patient should have to travel to the health facility is 3kms [and] in all the high-density settlements in the sub-districts of Cape Town Metro district, where most of the uninsured population live, access is well within this norm.'⁵⁶⁵ Despite the Western Cape Department of Health's assertion that medical care is accessible, many participants clearly identified transportation costs to medical facilities as a financial barrier.

- In previous cost of violence studies it has been suggested that 'in low-income countries the majority of victims of violence prefer household or non-hospital based treatment.'⁵⁶⁶ This may not be the case for sexual assault victims in South Africa due to the high prevalence of HIV and sexually transmitted diseases and the need for sexual assault victims to obtain formal medical attention to address this important concern.⁵⁶⁷

With regards to some other concerns noted in the literature, firstly, although most of the participants in the survey did report to the government funded and coordinated Thuthuzela Care Centre, the *Violence against Women, a National Study* confirms that 'the lack of transport was the most common reason' for 'a delay between the time of abuse and the time that women sought medical assistance and 'lack of transport' was one of the 'main reasons given for delayed [district surgeon] examinations.'⁵⁶⁸

Finally, many of the participants noted burdensome medication costs and post-hospital costs and in this regard Dalal and Jansson confirm that 'in most-low-income countries... governments provide public medical facilities with hospital beds and services... but the victim has to bear many extra costs, namely medical drugs, medical instruments,

⁵⁶⁵ Western Cape. Department of Health (2007: 16).

⁵⁶⁶ Dalal and Jansson (2007: 48).

⁵⁶⁷ Rasool et al (2002: xvi) confirm that 'the main concern for survivors of sexual abuse [in South Africa] was contracting a sexually transmitted disease or HIV/AIDS.'

⁵⁶⁸ Rasool et al (2002: xvii).

laboratory diagnoses and paramedical services... [follow-up] medical re-examination costs... [and] natural traditional treatments with herbs and shrubs.' ⁵⁶⁹

Suggestions for improvements at post-rape medical care in hospitals regarding service delivery, access to free medications/services and transportation barriers/subsidies should be directed to 'hospital boards' such as the *GF Jooste Hospital Board* where the Thuthuzela Care Center is situated. In this regard, in a Department of Health report entitled *Public Hospitals, A decade of transformation 1994-2004* it is confirmed that hospital boards 'are both watchdog over and friend to hospital management' and 'at times they speak for the community to the hospital administration.' ⁵⁷⁰ The report also cites the *Groote Schuur Hospital Board* in Cape Town as an example of how 'the establishment of the board strengthened consultations with the community through regular meetings.' ⁵⁷¹ With this in mind, *Groote Schuur Hospital* also has a post-rape medical legal clinic and it was confirmed by the Board, in the said report, that communities and stakeholders 'from Mitchell's Plain to as far as Khayelitsha [took part in consultations]... as it is important to ensure that even people in the informal settlements benefit from the [hospital's] services.' ⁵⁷² The report goes on to confirm that community inputs were partially responsible for the initiation of a programme to 'deliver medications to the homes of the poor ... at an affordable price.... as [hospitals] cannot deny people access to quality health care because they live far from the hospital or lose working hours because of the long queues.' ⁵⁷³

⁵⁶⁹ Dalal and Jansson (2007: 48).

⁵⁷⁰ South Africa. Department of Health (2004: 33).

⁵⁷¹ Ibid.

⁵⁷² Ibid.

⁵⁷³ Ibid.

3) Telephone losses

Of the thirty-six (36) participants who identified economic loss(es), twelve (12) participants identified telephone related economic losses.

Of those participants that noted estimated telephone related Rand expenditures (as some participants did not provide Rand/monetary estimates):

- Two (2) participants had estimated expenditures of under 100.00 Rands;
- Two (2) participant had estimated expenditures of between 100.00 Rands and 500.00 Rands; and,
- One (1) participant had estimated expenditures of over 4,500.00 Rands.

Furthermore, the following number of participants specified the following types of telephone economic loss(es) (note that some participants identified more than one type of telephone economic loss, for example for court *and* for police):

- Six (6) participants identified telephone calls to police as economic losses;
- Three (3) participants identified telephone calls to prosecutor/court as an economic losses;
- One (1) participant identified telephone calls for medical reasons as economic loss;
- One (1) participant identified telephone calls for security as economic loss;
- One (1) participant identified telephone calls to family or emotional support;
- One (1) participant identified twelve days of telephone expenditures;
- One (1) participant identified two-years of telephone expenditures;
- One (1) participant identified telephone economic loss as ongoing.

The foremost mentioned telephone economic loss categories of the participants were police and prosecution related. These telephone costs are not subsidized by court assistance programmes. In addition, Day and McKenna confirm that 'women who do not have organized support groups may have a special friend or a sister or another relative in whom they can confide [and] often these people do not live locally and the woman must bear the cost of long-distance telephone calls.' ⁵⁷⁴

⁵⁷⁴ Day and McKenna (2002: 328).

4) Property replacement/damage

Of the thirty-six (36) participants who identified economic loss(es), twelve (12) participants identified property replacement or damage related economic losses.

Of those participants that noted estimated property related Rand expenditures (as some participants did not provide Rand/monetary estimates):

- Two (2) participants had estimated expenditures of under 100.00 Rands;
- Five (5) participants had estimated expenditures of between 100.00 Rands and 600.00 Rands; and,
- One (1) participant had estimated expenditures of over 1,400.00 Rands.

Furthermore the following number of participants specified the following types of property replacement/damage economic losses (note that some participants identified more than one type of property replacement/damage economic loss, for example personal effects *and* jewelry):

- Five (5) participants identified clothing economic losses due to theft or damage;
- Four (4) participants identified jewelry (earrings, necklace, wedding ring) economic losses due to theft;
- Four (4) participants identified economic losses relating to personal effects (DVD, CD, bag, cell phone) due to theft;
- Two (2) participants identified currency/bank notes economic losses due to theft;
- Two (2) participant identified shoe replacement as economic losses due to theft or damage; and,
- One (1) participant identified window replacement as an economic loss due to damage.

5) Emergency housing losses

Of the thirty-six (36) participants who identified economic loss(es), nine (9) participants identified emergency housing related economic losses.

Of those participants that noted estimated emergency housing related Rand expenditures (as some participants did not provide Rand/monetary estimates):

- One (1) participants had estimated expenditures of under 100.00 Rands;
- One (1) participant had estimated expenditures of between 100.00 Rands and 600.00 Rands; and,
- Two (2) participants had estimated expenditures of over 4,400.00 Rands.

Furthermore, the following number of participants specified the following types of emergency housing economic loss(es) (note that some participants identified more than one type of emergency housing economic loss, for example losses related to a deposit *and* to storage):

- Two (4) participants identified using bank of favors for emergency housing by obtaining assistance from family, friend or employer;
- Two (2) participants identified emergency housing for one year as economic losses;
- Two (2) participants identified emergency housing for a few nights as economic losses;
- One (1) participant identified emergency housing for two months as an economic loss;
- Two (2) participants identified moving costs to emergency housing as economic losses;
- Two (2) participants identified dependent(s) emergency housing costs as economic losses;
- One (1) participant identified a deposit for emergency housing as an economic losses;
- One (1) participant identified car storage while in emergency housing as an economic loss; and,
- One (1) participant identified shack relocation as an economic loss.

As noted by the participants, emergency housing economic losses include expenses associated with searching for, obtaining, and moving into emergency accommodation. One participant indicated that she attended a government subsidized shelter after her assault, although this option may not be suitable for many victims because of eligibility, transport, availability and cultural concerns.

Furthermore, some participants suggested that they should initially attempt to remove the (alleged) offender from their premises before engaging in emergency housing options themselves. In this regard, victims unfortunately may find it difficult to remove abusers from their immediate environments, thereby necessitating emergency housing. This situation is exemplified in a recent sexual harassment matter reported in the media wherein the complainant wished to remove an (alleged) offender from her apartment block. In this regard, although the complainant wanted the (alleged) offender 'off the premises... after she laid a charge with the police [and] the man was arrested [and] later released... the owner of the man's apartment... said he would not evict the tenant until the outcome of the court case' as 'he could open himself up to legal action if the man was acquitted.'⁵⁷⁵

Furthermore, remedies under the *Domestic Violence Act No. 116 of 1998* can be pursued to remove an offender, while additionally making him pay for bonds and other household expenses. Once again, however, these remedies may not be culturally appropriate and the risk of inciting the perpetrator with protection orders and emergency monetary relief orders must always be assessed and weighed by the victim.

Lastly, should alternative emergency housing be needed, Day and McKenna confirm that 'if a woman leaves a violent home situation, she will be faced with furnishing a new home for herself and her children [and] estimates of such costs can easily run into the tens of thousands per woman.'⁵⁷⁶

⁵⁷⁵ Bamford 'Peeping Tom causes a stir' *Cape Argus* (12 April 2008) at 4.

⁵⁷⁶ Day and McKenna (2002: 329).

6) Security losses

Of the thirty-six (36) participants who identified economic loss(es), seven (7) participants identified security related economic losses.

Of those participants that noted estimated security related Rand expenditures (as some participants did not provide Rand/monetary estimates):

- One (1) participant had estimated expenditures of under 100.00 Rands;
- Three (3) participants had estimated expenditures of between 100.00 Rands and 600.00 Rands; and,
- Two (2) participants had estimated expenditures of over 900.00 Rands.

Furthermore the following number of participants specified the following types of security economic losses:

- Three (3) participants identified cost and installation of perimeter security (bars, gates or security fencing) as economic losses;
- Two (2) participants identified alarm installation as economic losses;
- Two (2) participants identified ongoing security service fees as economic losses;
- Two (2) participants identified security locks as economic losses; and,
- Two (2) participants identified other personal security items as economic losses (including pepper spray, cell phones and support person transportation costs).

The foremost security related economic loss indicated by the participants was associated with home security systems' installations or services. These costs are not subsidized by any court assistance programmes or the state. In addition, the SA Institute for Race Relations (SAIRR) confirms that 'individuals are offered no tax relief for private security costs, including for erecting defensive walls, armed-response services, razor wire, guard dogs, insurance or any other security expenses which relate to 'non-business activities.'⁵⁷⁷

⁵⁷⁷ 'SA forks out for high crime rate' The Star (5 April 2008) cites SAIRR researcher K Lebone.

On a race/class basis it should be noted that participants' identification of home security improvements expenses implies that they necessarily had disposable income to use for this purpose and that their dwellings could accommodate security improvements. Conversely, many participants who lived in informal settlements, in shacks, could not ensure security upgrades to their homes as their wooden shacks could not accommodate this.

Finally, women may choose different methods to enhance security that are not related to home improvements or services. Some of these may be transportation related, for example by changing travel methods or using new routes that turn out to be more expensive⁵⁷⁸ while other measures involve using a cell phone to notify friends or family of their whereabouts and to keep in cases of emergency. In this regard, one participant noted that she 'always phone[s] boyfriend to escort me wherever I go so I have to spend double the amount [on transportation].'

⁵⁷⁸ Note the finding in a judgment from the Ontario Superior Court, *Jane Doe v Board of Commissioners of Police* 39 Ontario Reports (3d) 487 (1989): 'Ms. Doe claims the cost of evenings cab fares because she cannot feel safe using public transit at that time and since being raped. She estimates taking a cab four times weekly for all 52 weeks of the year. I think if the sum of \$2,000 annually were allowed she would be fairly compensated. I would therefore award the sum of \$22,500 to the commencement of the trial.'

7) Employment losses

Of the thirty-six (36) participants who identified economic loss(es), seven (7) participants identified employment related economic losses.

Of those participants that noted estimated employment related Rand expenditures (as some participants did not provide Rand/monetary estimates):

- One (1) participant had estimated expenditures of 150.00 Rands (informal sector);
- Two (2) participants had estimated expenditures of between 900.00 Rands and 1,400.00 Rands; and,
- One (1) participant had estimated expenditures of 15,000.00 Rands.

Furthermore, the following number of participants specified the following types of employment related economic losses:

- Three (3) participants identified depletion of paid leave as economic losses;
- Two (2) participants identified 3 weeks of lost income as economic losses;
- One (1) participant identified five and a half months of lost income as an economic loss;
- One (1) participant identified five days of lost income as an economic loss;
- One (1) participant identified lost income in the informal sector as an economic loss;
- One (1) participant identified unplanned resignation as an economic loss;
- One (1) participant identified a debt problem aggravated by lost income as an economic loss;
- One (1) participant identified the time-off of a court-support family member as an economic loss; and,
- One (1) participant noted that she was not eligible for government unemployment insurance.

Income loss is difficult to calculate and/or estimate. It is asserted that this is especially the case in sexual violence matters where psychological injuries may be more severe and long-lasting, when compared to the physical injuries sustained.

Furthermore, two other concerns must be addressed in relation to employment related economic losses. Firstly, as suggested in studies in other developing countries, and

also confirmed by a participant, one should also 'consider the cost of lost income of relatives or other concerned persons who were not able to attend their regular work due to taking care of the victim.'⁵⁷⁹

In addition, as identified by the Public Service Commission, victims must balance 'trade-offs and inconveniences to be present at [criminal] court' and according to the findings, 39% of court users surveyed in 42 magistrates courts throughout the country indicated that they 'had to take work leave' to attend criminal proceedings while 30% indicated they were 'unable to earn money/work.'⁵⁸⁰ This correlated to 'two out of five court users indicat[ing] that they had to take leave from work or negotiate with their employers' and 'almost one third of court users indicat[ing] that having to be at court translated into their inability to work or earn a living.'⁵⁸¹ This was consistent with the participants' identifications as employment income losses, and disruptions clearly affected many of the participants and their dependants or employers.

⁵⁷⁹ Dalal and Jansson (2007: 51).

⁵⁸⁰ South Africa. Public Service Commission (2005: 16).

⁵⁸¹ Ibid.

8) School losses

Of the thirty-six (36) participants who identified economic loss(es), six (6) participants identified school related economic losses.

Of those participants that noted estimated school related Rand expenditures (as some participants did not provide Rand/monetary estimates):

- One (1) participant had estimated expenditures of 50.00 Rands; and,
- One (1) participant had estimated expenditures of 210.00 Rands.

Furthermore the following number of participants specified the following types of school related economic losses (note that some participants identified more than one type of school related economic loss, for example educational problems *and* school fees losses):

- Three (3) participants identified educational problems (for up to 6 months);
- Two (2) participants identified the failure of standard 8 as an economic loss;
- One (1) participant identified the failure of standard 9 as an economic loss;
- One (1) participant identified abandonment of further education due to injuries;
- One (1) participant identified lost/abandoned school fees as an economic loss;
- One (1) participant identified re-registration fees as an economic loss; and,
- One (1) participant identified school books as an economic loss.

Literature suggests that there are three areas to consider in relation to school interruptions. Firstly, past victim costs studies have asserted that it is important to review 'productivity losses', irrespective of the existence of physical injury, by looking at days absent from 'school, volunteer activities [and] social/recreational activities.'⁵⁸² Secondly, taking a broader approach, some studies have also concluded that school interruptions affect long term incomes and professional/employment goals of victims.⁵⁸³ Finally, indirect costs of lost school fees and unused materials must be assessed.⁵⁸⁴ All of the above issues and concerns were identified by the participants surveyed.

⁵⁸² Arias (2008: 385).

⁵⁸³ For example, Day and McKenna (2002: 315) state that one must also assess the 'costs of lost educational opportunities' and Minnesota Department of Health (2007: 8) confirms the importance of reviewing 'forgone wages due to compromised education and foregone non-monetary benefits of education.'

⁵⁸⁴ See South African Human Rights Commission *Report of the Public Hearing on the Right to Basic Education* (2005:13) wherein the Commission refers to the 'many indirect costs...[related to schooling, which] include school uniforms, transport, learner materials...'

9) Counseling losses

Of the thirty-six (36) participants who identified economic loss(es), four (4) participants identified counseling related economic losses (note that one participant indicated expenses relating to psychiatric care under the medical expenses category).

Of those participants that noted estimated counseling related Rand expenditures (as some participants did not provide Rand/monetary estimates):

- One (1) participant had estimated expenditures of 4 800.00 Rands; and,
- One (1) participant had estimated expenditures of 16 000.00 Rands.

Furthermore, the following number of participants specified the following types of counseling related economic losses:

- One (1) participant identified psychologist costs as an economic loss;
- One (1) participant identified expenses for one year of counseling as an economic loss;
- One (1) participant identified expenses for forty counseling sessions as an economic loss.

Counseling related costs were incurred by participants in two ways; firstly, when some of the participants attended private counseling sessions and incurred costly session fees; or alternatively when participants paid for transportation costs to attend free counseling services provided by non-governmental organizations. Evidently, race/class barriers exist in relation to this category of economic loss, with private counseling services out of reach for most of the indigent, black participants; and with transportation costs to counseling often being a barrier to services for these same participants.

Furthermore, it should be noted that counseling services coordinated within and by court structures or prosecutorial services, can be inadequate or non-existence despite their necessity to victims in lower economic strata.⁵⁸⁵

⁵⁸⁵ See Walker and Louw (2004: 306-307) where it is noted that an area of 'dissatisfaction' in the above specialized court was 'therapeutic follow-up' and 'both the victims (85%) and their families (63.6%) felt that the victims of sexual offences were in need of some form of psychotherapeutic treatment or counseling' and 'in the absence of professional support services, 51.3% of the victims and 18.2% of the family members reported having to rely on their relatives or the community to help them deal with their trauma.' Furthermore, the Department of Social Development's *2007-2010 Strategic Plan* (2007: 13) confirms that 'the inadequate numbers of social workers render the [social development] sector unable to

10) Childcare losses

Of the thirty-six (36) participants who identified economic loss(es), three (3) participants identified childcare economic losses.

None of the participants that identified childcare economic losses provided estimated childcare Rand expenditures.

Furthermore the following number of participants specified the following types of childcare economic losses:

- One (1) participant identified bartering for childcare with neighbor as an economic loss;
- One (1) participant identified childcare related to court attendance as an economic loss;
- One (1) participant identified use of limited goodwill as an economic loss.

With regards to 'citizens' trade-offs and inconveniences to be present at [criminal] court,' the Public Service Commission's *Citizen Satisfaction Survey* confirmed that 25% of court users, surveyed in 42 magistrates courts throughout the country, indicated that they 'had to make alterative plans to take care of their children' to attend criminal proceedings.⁵⁸⁶

In addition, Day and McKenna confirm that 'when women spend time attending doctor appointments, therapy sessions, women's support groups, or in longer-term admissions to hospitals or clinics, they are often faced with having to find and pay for childcare or eldercare.'⁵⁸⁷ With regards to practical trade-offs between familial duties and the recovery concerns of women survivors Day and McKenna further confirm that 'sometimes the need for childcare prevents women from seeking the help they would otherwise access.'⁵⁸⁸

respond to the service delivery demands and statutory obligations such as those required by specific pieces of legislation like... [the] Criminal Procedure Act.'

⁵⁸⁶ Public Service Commission (2005:16).

⁵⁸⁷ Day and McKenna (2002: 329).

⁵⁸⁸ Ibid.

11) Miscellaneous losses

Of the thirty-six (36) participants who identified economic loss(es), two (2) participants identified economic losses not enumerated in the survey.

Of those participants that noted estimated Rand expenditures for non-enumerated items (as some participants did not provide Rand/monetary estimates):

- One (1) participant had estimated expenditures of 8 000.00 Rands for a lawyer;
- One (1) participant had estimated expenditures of 300.00 Rands for a sheriff; and,
- One (1) participant had estimated expenditures of 3 000.00 Rands for comfort items (such as food, clothes, appliances and alcohol).

With regards to lawyer and legal processes, Day and McKenna confirm that the 'direct costs of violence to the individual might involve... legal fees.'⁵⁸⁹ Also, with regards to comfort items Day and McKenna confirm that 'many women victims of violence turn to alcohol and/or drugs to cope.'⁵⁹⁰

⁵⁸⁹ Day and McKenna (2002: 315).

⁵⁹⁰ Day and McKenna (2002: 324).