

**THE UNRAPEABLE BLACK WOMAN: UNDERSTANDING THE  
PLIGHT OF THE BLACK RAPE COMPLAINANT IN  
CONTEMPORARY SOUTH AFRICA**

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ALBZET001



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## **COMPULSORY DECLARATION**

This work has not been previously submitted in whole, or in part, for the award of any degree. It is my own work. Each significant contribution to, and quotation in, this dissertation from the work, or works, of other people has been attributed, and has been cited and referenced.

Signature:

Date: 13 December 2023

Signed by candidate

### ***Dedication***

This dissertation is dedicated to me and to all other rape victims who were unable to find refuge within the criminal justice system. I see you, I believe you, and I stand with you. I'm sorry that the system let you down. I hope you find healing.

I'll be quiet when  
we can say *sexual assault*  
and they  
stop screaming *liar*  
– Rupi Kaur

## *Acknowledgements*

To God, thank you for allowing your glory to shine through me. Thank you for dwelling within me and me within you, and for trusting me with the gift of life and purpose. Here's to co-creating forever.

To my ancestors, thank you. I see you beside me, in front of me, and within me always. I am because you are.

To my parents and family, thank you so much. You have supported me since day one and believed in me when I did not.

To my brothers, Lwanda and Unathi, thank you for everything you are to me. You will always be my greatest source of inspiration and encouragement.

To my friends, besties it's finally happening. Thank you for being my community, for rooting for me, and for loving me. In moments of fear and doubt, you continued to affirm me until the very end.

To my supervisor, thank you for being so patient with me. Thank you for believing in my research and my ideas.

Finally, to myself, I'm so proud of you. Thank you for awakening to the fact that you are capable of anything you put your mind to. Continue taking risks, breaking boundaries, and believing in yourself.

## *Abstract*

Despite various research studies on rape investigation and prosecution, as well as the treatment/mistreatment of victims, it remains a concern in South Africa. Victims often hesitate to disclose incidences of sexual violence, and those who do face challenges in being believed or having their cases heard in court. This difficulty arises from the inherent complexity of proving rape, contributing to a pervasive mistrust of rape victims. This issue is particularly troubling for Black women, as the colonial-generated perception of their bodies portrays sexual violence as an expected outcome of their ordinary sexual behaviours, categorising them as supposedly immune to rape. Black women are consequently displaced as victims of rape due to their historic hyper-sexualisation and over-sexualisation. The objective of this thesis is to comprehend the plight of Black rape victims within the criminal justice system. I contend that, due to the myth of the unrapeable Black woman, Black rape complainants must fight for credibility in the eyes of the criminal justice system actors. Stereotypically based judgements continue to negatively impact perceptions and decision-making concerning the rape of Black women. Utilising personal narrative-focused research and sharing my experiences as a Black rape complainant in South Africa, this thesis contends that the criminal justice system's judgements of Black women's rape experiences mirror broader societal attitudes towards rape and race. The study aims to elicit a critical, constructive assessment of the criminal justice system's culture and practices to improve the societal response to victims of sexual violence, thus preventing the miscarriage of justice for Black rape complainants. This study advocates for the decolonisation of the criminal justice system by examining its adherence to colonial ideals.

*Keywords: Rape, Black women, Unrapeable, Criminal Justice System, South Africa*

## **TABLE OF CONTENTS**

### **I. INTRODUCTION**

- (a) Background
- (b) Research Question
- (c) Research Significance
- (d) Contribution to Existing Literature
- (e) Methodology
- (f) Structure

### **II. THE HISTORICAL ROOTS OF THE UNRAPEABLE BLACK WOMAN IN SOUTH AFRICA**

- (a) Colonialism
- (b) Rape as a Tool of Colonialisation
- (c) Colonial Criminal Justice Response to Rape
- (d) Apartheid
- (e) Rape as a Tool of Apartheid
- (f) Apartheid Criminal Justice System Response to Rape
- (g) Conclusion

### **III. THE HUMAN RIGHTS FRAMEWORK ENACTED TO COMBAT THE HISTORICAL INJUSTICE**

- (a) The Constitution
- (b) Rape as a Human Rights Violation
- (c) Equality
- (d) Human Dignity
- (e) Right to Life
- (f) Freedom and Security of Persons including The Right to be Free from All Forms of Violence from Public and Private Sources.
- (g) Conclusion

### **IV. THE UNRAPEABLE BLACK WOMAN IN CONTEMPORARY SOUTH AFRICA**

- (a) Rape in Contemporary South Africa
- (b) The Criminal Justice Response to Rape
- (c) The South African Police Service
- (d) The National Prosecuting Authority of South Africa
- (e) The Judiciary
- (f) Conclusion

### **V. CONCLUSION**

***THE UNRAPEABLE BLACK WOMAN: UNDERSTANDING THE  
PLIGHT OF THE BLACK RAPE COMPLAINANT IN  
CONTEMPORARY SOUTH AFRICA***

*'A Black woman's body is  
Your gender being weaponised against you  
Your grief made public  
Your fight to stay alive each day  
Being born into a war  
Being told to make tea for the uncle who violated you  
Being told you are a woman  
before you understand what it means to be a woman.'*<sup>1</sup>  
Bokang Maragelo

## **I. INTRODUCTION**

Rape is an ancient crime that has existed since the dawn of time, from pre-colonisation to colonisation and into the present day.<sup>2</sup> Rape is a reality that has no regard for nationality, class status, political affiliation, or even skin colour.<sup>3</sup> It does not ask if you are the Chief Executive Officer of a company or a domestic worker before it strikes and leaves you gasping in pain and struggling to breathe. However, as Joanna Bourke points out: 'there is no crime more difficult to prove than rape and no injured party more distrusted than the rape victim'.<sup>4</sup> In addition, Lonsway states that:

the underlying scepticism that sexual assault survivors face when they disclose may be the single most damaging factor in our societal response. It may also be the most powerful in the arsenal of rapists because it allows them to commit their crimes with impunity.<sup>5</sup>

Rape accounts are evaluated based on the victim's credibility and the degree to which the hearer believes the account.<sup>6</sup> According to Pumla Gqola, the believability of a rape victim is

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<sup>1</sup> Bokang Maragelo *A Beautiful Sunday* (2020) 63.

<sup>2</sup> Lungile Gama Lechesa *The Psychology of Disclosure: What Breaks or Maintains the Silence on Silent Protest Day and Beyond?* (Master's Dissertation, University of the Witwatersrand, 2017) 19.

<sup>3</sup> Zethu Albanie *'Surviving' Rape* (Unpublished Master's Research Paper for Gender and Literature - Final Paper, University of Cape Town, 2021) 1.

<sup>4</sup> Joanna Bourke *Rape: A History from 1860 to the Present* (2007) 23.

<sup>5</sup> Kimberly A. Lonsway 'Trying to Move the Elephant in the Living Room: Responding to the Challenge of False Rape Reports' (2010) 16 (12) *Violence Against Women* 1367.

<sup>6</sup> Pumla Dineo Gqola *Rape: A South African Nightmare* (2015) 29.

determined by how closely their rape follows their society's perception of 'what rape looks like, who rapes, who can be raped, and when and how'.<sup>7</sup> In other words, our belief of/ our trust in/ our willingness to believe a rape victim is dependent on our perception of what rape looks like.<sup>8</sup> Therefore, the more closely their rape account resembles our perceptions of what rape looks like, the more inclined we are to believe them.<sup>9</sup> This means that victims who report rape are expected to develop undeniable, and most likely unachievable, narratives of sexual innocence to escape being held accountable for being raped.<sup>10</sup> The discourse around the potential 'ideal victim' revolves around social status and interpretations, which are severely interwoven with white supremacist ideals.<sup>11</sup> Consequently, individuals from marginalised communities, such as Black women<sup>12</sup>, are seldom granted attributes associated with the 'ideal victim' status.<sup>13</sup> The distinction in society between who is considered a 'good' or 'bad' victim eventually defines the extent to which these victims receive help and compassion, or simply oblivion and disdain.<sup>14</sup> Wagner highlights that rape myths, initially developed by white heterosexual men to maintain control and ownership over women, persistently influence how complainants are treated across society.<sup>15</sup> However, as Black rape complainants, we face an even more intricate and discriminatory layer of such myths specifically that of the 'unrapeable Black woman'.<sup>16</sup>

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<sup>7</sup> Gqola op cit note 6 at 29.

<sup>8</sup> Ibid.

<sup>9</sup> Ibid.

<sup>10</sup> Tamaryn Jane Nicholson 'A Call to Action' (2016) (52) *Psychology in Society*.

<sup>11</sup> Moa Eriksson Krutrök & Mathilda Åkerlund 'Through a White Lens: Black Victimhood, Visibility, and Whiteness in the Black Lives Matter Movement on TikTok' (2023) 26(10) *Information, Communication & Society* at 3.

<sup>12</sup> I am aware of the intricate arguments for and against the inclusion or exclusion of certain bodies within the classification of 'African,' 'Black African,' 'woman,' and 'man,' all of which are contested and reinforce binaries. Furthermore, I recognise that it is problematic to reduce trans and other non-conforming people to binary gender categories. Therefore, this study's definition of 'woman' includes anyone who identifies as a woman and is not limited to cisgender women. The term 'Black' will be used throughout this thesis to refer to people of African, Indian, and Coloured ancestry unless the context clearly indicates otherwise.

See Shahana Rasool and Linda Harms Smith 'Retrieving the Voices of Black African Womanists and Feminists for Work Towards Decoloniality in Social Work' (2022) 34(1) *Southern African Journal of Social Work and Social Development* at 2.

<sup>13</sup> Krutrök & Åkerlund op cit note 11.

<sup>14</sup> Ibid.

<sup>15</sup> Maggie Wagner *Black Women's Security and Barriers to Reporting Sexual Assault to Police: "It Couldn't Be Any Worse of a System"* (Doctoral dissertation, Columbia University, 2022).

<sup>16</sup> Ibid.

## (a) Background

Historically Europeans, in particular, have transformed the Black female body into a site of violence.<sup>17</sup> As Black women, our bodies have endured being ‘beaten, broken, stolen and shamed’.<sup>18</sup> We have been reduced to a mere sum of our body parts, experiencing what gender studies researchers like Hobson call ‘a history of enslavement, colonial conquest, and ethnographic exhibition’.<sup>19</sup> Although the heinous exploitation of Black women’s bodies is not limited to a specific era or offender, historians like Foutz have traced this trend back to as early as the sixteenth century and even beyond the European imagination.<sup>20</sup> Coppola further elaborates on this historical narrative, explaining how the Black female body has been stripped of its autonomy over time, expelled from intellectual settings, and presented to the public as a ‘bizarre’ spectacle.<sup>21</sup> As a result, the struggle of Black women throughout history is made clear by how our bodies have both been devalued and fetishized in line with rigid gendered and racist roles that dictated our ability to engage in society.<sup>22</sup> Therefore, when racism and sexism intersect, as Black women we experience humiliation, hardship, and prejudice.<sup>23</sup> This is due to systematic and institutionalised violence that devalues, demeans, and debases entire groups of people and heightens our perceived inferiority – a fundamental component of the symbiotic relationship between racism and sexism.<sup>24</sup>

Yvette Abrahams offers a helpful analysis of where rape fits into this symbiotic relationship:

Physical pain aside, the enduring trauma of rape is that, like slavery, it makes a person a thing. It denies human subjectivity. A woman who has been raped is implicated: it has happened, and she has to give it a meaning, any meaning that enables her to make sense of its horror, even the possibility that she herself was somehow to blame [ . . . ] Thus the dehumanisation of rape does

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<sup>17</sup> Tayler FRIAR ‘The Black Female Body: Representation of the Erotic in Contemporary Visual Art in Africa’ (2021) 19(1) *E-rea. Revue électronique d’études sur le monde anglophone* 1.

<sup>18</sup> Ibid at para 2.

<sup>19</sup> Ibid.

Also see Janell Hobson ‘Viewing in the Dark: Toward a Black Feminist Approach to Film’ (2002) 30(1/2) *Women’s Studies Quarterly* 87.

<sup>20</sup> Dave Foutz ‘Enlightenment, Scientific Racism and Slavery: A Historical Point’ (2008) 36(2) *FALSAFEH: The Iranian Journal of Philosophy* 5.

<sup>21</sup> FRIAR op cit note 17. Also see Manuela Coppola ‘Chapter Two “All My Weapons Within Me:” Bodily Archives of the Caribbean Diaspora’ (2012) *Women’s Identities and Bodies in Colonial and Postcolonial History and Literature* 25.

<sup>22</sup> Ibid.

<sup>23</sup> Lyn Snodgrass ‘South Africa: A Dangerous Place To Be Poor, Black And A Woman’ *The Conversation* 11 September 2015, available at <https://theconversation.com/south-africa-a-dangerous-place-to-be-poor-black-and-a-woman-47287>, accessed on 4 December 2022.

<sup>24</sup> Ibid.

not lie in the act alone, nor in the memory of it, but in the trauma which induces the rape victim to deny her own subjectivity.<sup>25</sup>

Abrahams's concept of subjectivity denial is reminiscent of Aimé Césaire's 'thing-ification' theory.<sup>26</sup> According to Césaire's theory, some bodies are thought to be destined to become 'things,' a perspective that led Black women to be thought of as 'always already raped'.<sup>27</sup> This notion is reinforced by the idea of the unrapeable Black woman, as addressed by Gqola.<sup>28</sup> Gqola clarifies that this does not imply that Black women were/are never raped, instead, it means that we are deemed 'safe to rape' or that raping us is not considered harmful due to our 'inherent' hypersexuality.<sup>29</sup> This understanding of who is unrapeable, according to Gqola, is consistent with the racist and sexist colonial ideals that objectified colonial women.<sup>30</sup> Gqola goes on to claim that it is not a coincidence that when we as Black women allege that we have been raped we are seldom taken seriously and are often expected to just get over it.<sup>31</sup>

### **(b) Research Question**

This thesis contends that the European colonisation of South Africa imported and perpetuated racist and patriarchal stereotypes in the country. These historical stereotypes depict Black women as 'dirty, lazy, degraded, easily sexually exploited and ... incapable of rescue', thus depicting Black women as 'unworthy' and 'ungrievable' victims.<sup>32</sup> Consequently, these stereotypes influence present-day societal responses to the victimisation of Black women, hindering their pursuit of justice despite improvements in the criminal justice response to sexual violence.<sup>33</sup> The central question guiding this dissertation is: *How has the colonial conception of the unrapeable Black woman influenced social response to the victimisation of*

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<sup>25</sup> Yvette Abrahams 'Was Eva Raped? An Exercise in Speculative History' (1996) 23(1) *Kronos: Journal of Cape History* at 10.

<sup>26</sup> Rebecca Helman 'Why Are All rapes Not Grievable?' (2018) 48.4 *South African journal of psychology* at 403-406.

<sup>27</sup> Ibid.

<sup>28</sup> Gqola op cit note 6

<sup>29</sup> Ibid.

<sup>30</sup> Ibid.

<sup>31</sup> Ibid.

<sup>32</sup> Allison McKibban "'Speaking Out' against Colonialism and Sexual Violence" *History Workshop* 11 May 2022 available at <https://www.historyworkshop.org.uk/violence/speaking-out/>, accessed on 12 May 2023.

<sup>33</sup> AEquitas and The National Black Prosecutors Association, with Wendy Gu & Priscilla Hamilton 'Confronting Racial Bias Against Black and African American Victims in the Prosecution of Sexual Violence, Domestic Violence, Stalking, and Human Trafficking' (2021) Issue 18 *Strategies The Prosecutors' Newsletter on Violence Against Women* 3.

In this thesis, the term 'criminal justice system' refers specifically to three actors within the system, namely the South African Police Service, the National Prosecuting Authority, and the Judiciary.

*Black women, especially throughout the criminal process?* To address this overarching question, the following question, the following sub-questions are proposed:

1. What has happened in history that has constructed a vehicle wherein Black rape complainants' voices are silenced, and their trauma has been dismissed?
2. How has the colonial imperialist framework contributed to a system within rape culture that disproportionately impacts Black women?
3. How has the criminal justice system perpetuated this narrative of the unrapeable Black women in the past and present and thus normalised the victimisation of Black women?

The purpose of this introductory chapter is to set the stage for the inquiry at hand, and the significance of the research question is made more explicit. It also discusses the contribution this study intends to make to existing literature. In conclusion, the section outlines the research methodology and overall structure of the dissertation.

### **(c) Research Significance**

'Who knows what the Black woman thinks of rape? Who has asked her? Who cares?'<sup>34</sup> Kimberlé Crenshaw argues that within academia rape has largely been described by white feminist scholars, who define it too narrowly as a 'manifestation of male control over female sexuality' and fail to account for how sexual violence has been used as a weapon to inflict 'racial terror' upon Black women.<sup>35</sup> Li'Tsoanelo Zwane adds that white women researchers, identifying as feminists, have boldly assumed that their experiences with gender are identical to those of Black women, disregarding the historical and contemporary constructions of Black womanhood and bodies.<sup>36</sup> Understanding society's perception of the Black female body is crucial to comprehending the unique gendered experiences of Black women.<sup>37</sup> The hypersexualisation of Black women's bodies, rooted in racist and orientalist fixations on our genitalia, persists today.<sup>38</sup> Zwane notes that Black women's bodies have been 'orientalised', akin to the historical exhibition of Sara Baartman, where our bodies are constantly on show.<sup>39</sup> Due to the complexity and humanity we embody, Zwane states that Black women's bodies

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<sup>34</sup> *Tshabalala v S; Ntuli v S* (2020) (2) SACR 38 (CC) para 68.

<sup>35</sup> Kimberlé Crenshaw 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics' (1989) 8(1) *University of Chicago Legal Forum* 158.

<sup>36</sup> Li'Tsoanelo Zwane *Dislocating the Body and Transcending the Imperial Eye (I): The Role of Abaphantsi, through iiZangoma, as Pioneers for Transformative Research Methodologies and Organic Intellectualism* (Master's thesis, University of Cape Town, 2021).

<sup>37</sup> *Ibid.* at 41.

<sup>38</sup> *Ibid.*

<sup>39</sup> *Ibid.*

undergo a paradoxical experience of being both ‘hyper-visible and invisible’ simultaneously.<sup>40</sup> In other words, a Black woman’s encounters with racism and sexism are not independent but rather mutually constitutive.<sup>41</sup> There is no denying that racism and sexism have played a role in the long and tragic history of rape in South Africa.<sup>42</sup> Consequently, a post-apartheid society must address the marginalisation resulting from a segregated economic and social structure.<sup>43</sup>

Establishing a foundation for equality cannot ignore the legacy of institutionalised racism and sexism embedded within our society.<sup>44</sup> As noted by bell hooks, ‘the struggle to end racism and the struggle to end sexism were naturally intertwined, that to make them separate was to deny a basic truth of our existence, that race and sex are both immutable facets of human identity’.<sup>45</sup> Given this perspective, writing about rape in South Africa necessitates discussing racism alongside sexism. Due to my lived experience as a Black woman, it is impossible to draw clear lines between racism and sexism because I live at the intersection of both these realities. The focus on the experience of Black women in this thesis is not intended to negate the hostility that other racial groups may face within the South African criminal justice system. Furthermore, focusing on sexual violence experienced by Black women does not dismiss other challenges they confront or deny that sexual violence affects everyone. Instead, the purpose of this thesis is to give voice to my experience, as a Black rape complainant, with the criminal justice system. It is important to clarify that this thesis does not advocate that reporting rape to the police is the best option for victims, rather it acknowledges that victims only have access to the criminal justice system as a systemic accountability mechanism. Moreover, it seeks to highlight the effects of the sexist and racist narratives that underpin biases against and influence the mistreatment of Black victims by the police, prosecution, and judiciary.

#### **(d) Contribution to Existing Literature**

Gqola in her book *Rape: A South African Nightmare* investigates and clarifies the complex issue of sexual violence in South Africa.<sup>46</sup> Her book not only critiques the inadequacies in the

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<sup>40</sup> Zwane op cit note 36.

<sup>41</sup> ‘A racially marginalised woman does not experience the barb of racism merely as a race nor does she experience the barbs of sexism merely as a woman. The shape of the barb and the harm it inflicts are produced within simultaneous multiple facts that are gendered, racialised and classed and mutually constitute her identity and experiences’. See Heather Nancarrow *Unintended consequences of domestic violence law: Gendered aspirations and racialised realities* (2019) 10.

<sup>42</sup> Victoria Bronstein ‘The Rape Complainant in Court: An Analysis of Legal Discourse’ (1994) *Acta Juridica* 202.

<sup>43</sup> *Ibid* at 40.

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

<sup>45</sup> bell hooks *Aint I A Woman: Black Women and Feminism* (1981).

<sup>46</sup> Gqola op cit note 6.

country's response to its sexual violence epidemic but also debunks the misconception that rape is a post-apartheid phenomenon.<sup>47</sup> Gqola delves into the historical roots of sexual violence, stretching back as far as the 'architecture of the slave-ordered Cape Colony' and demonstrates how rape was systematically used throughout colonialism to oppress marginalised communities and maintain a white supremacist social order.<sup>48</sup> Therefore, the harshness and violent nature of rape in South Africa can be traced back to the country's peculiar oppressive political history.<sup>49</sup> Various researchers such as Armstrong, Jewkes, Moffett, and others have examined the relationship between apartheid and sexual violence.<sup>50</sup> They have studied the structural acts of violence institutionalised during the white-minority administration and how it has left indelible scars on the South African psyche, affecting gender relationships and sexuality intersections.<sup>51</sup> Feminist scholars like bell hooks have explored ideas of dominance that spawned colonialism and slavery, and how naming and defining Black females, and their bodies, became crucial tools of power.<sup>52</sup> hooks argues that Black women were objectified and then used to 'serve' the aims of dominant social institutions while also being seen as creatures with no intellectual capacities.<sup>53</sup> As a result, racism and sexism have a long history of being theoretically related.<sup>54</sup>

Due to the evident connections between the lives of women and racial minorities, researchers have investigated the co-occurrence of racism and sexism and found that 'a greater endorsement of racist ideals is associated with a greater endorsement of sexist ideals'.<sup>55</sup> Therefore, given the well-documented links between sexism and racism, more research into the relationship between racism and rape myth acceptance becomes required, particularly within the criminal justice system.<sup>56</sup> Scholars such as Dee Smythe have studied the issue of police discretion and how it impacts the criminal justice response to rape in South Africa.<sup>57</sup> Her work aims to understand why many rape victims who report do not receive justice or legal

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<sup>47</sup> Gqola op cit note 6.

<sup>48</sup> Ibid.

<sup>49</sup> Ibid.

<sup>50</sup> Sabine Hirschauer 'Rape and the State-sexual violence and its Political Narrative and Othering in 21st Century South Africa' (2014) 44(1) *Africa Insight* 84-102.

<sup>51</sup> Ibid.

<sup>52</sup> hooks op cit note 45.

<sup>53</sup> Ibid.

<sup>54</sup> Allison C Aosved and Patricia J Long 'Co-occurrence of Rape Myth Acceptance, Sexism, Racism, Homophobia, Ageism, Classism, and Religious Intolerance' (2006) 55 *Sex Roles*.

<sup>55</sup> Ibid.

<sup>56</sup> Ibid.

<sup>57</sup> Dee Smythe *Rape Unresolved: Policing Sexual Offences in South Africa* (2015).

protection.<sup>58</sup> According to Smythe, ‘the actions of criminal justice actors and the decisions they make are a crucial part of the attrition story’.<sup>59</sup> Her study aims to expose the gaps between the state’s commitment to tackling sexual violence through legal guarantees and their practical implementation.<sup>60</sup> Therefore, by synthesising these diverse theoretical ideas and expanding on the work done by these scholars, this thesis aims to encourage a critical, constructive review of the criminal justice system’s culture and practice to improve the experience for sexual violence complainants, particularly Black women. Furthermore, this research explores the image of the unrapeable Black women through a historical and contemporary perspective.

### (e) Methodology

In line with the words of Hélène Cixous:

Woman must write her self: must write about women and bring women to writing, from which they have been driven away as violently as from their bodies – for the same reasons, by the same law, with the same fatal goal. Woman must put herself into the text – as into the world and into history – by her own movement.<sup>61</sup>

This thesis employs a narrative feminist method as a research methodology and research approach, which allows the researcher to narrate their own experiences and recognise their personal accounts as reliable information or ‘data’.<sup>62</sup> This approach allows researchers to actively explore subjective meanings and experiences that may have been disregarded or silenced in a prior study, potentially challenging male-centred paradigms.<sup>63</sup> According to Zwane, the underlying concepts of mainstream feminist research are creating ‘the self’ (researcher) and ‘the other’ (respondent), making marginalised women the research focus is inherently orientalist.<sup>64</sup> Second, reinterpreting marginalised women’s lived experiences in a manner that is palatable and acceptable within academia is contemptuous and further entrenches the dichotomy between ‘the educated’ (researcher) and ‘the uneducated’ (respondent).<sup>65</sup> By not requiring that one person’s account exactly match another’s to prove

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<sup>58</sup> Smythe op cit note 57.

<sup>59</sup> Ibid.

Attrition refers to the process by which criminal cases fail to reach, or progress through the criminal justice system.

<sup>60</sup> Ibid.

<sup>61</sup> Hélène Cixous ‘The Laugh of the Medusa’(1975) *Feminisms redux: An anthology of literary theory and criticism* 416.

<sup>62</sup> Zwane op cit note 36.

<sup>63</sup> Ibid.

<sup>64</sup> Ibid.

<sup>65</sup> Ibid.

their legitimacy, narrative feminist research honours the uniqueness of each person's experience.<sup>66</sup> This dissertation is an attempt to construct and give voice to my narrative, based on my experience as a rape complainant, rather than to disparage those of others.

Personal narrative-focused research approaches are frequently greeted with opposition, with the root cause always being concerns about 'validity' and 'objectivity'.<sup>67</sup> This form of autoethnography has little value, according to Walford, because a social research report should attempt to present organised, logical statements supported by empirical evidence.<sup>68</sup> Perhaps the researcher's proximity to the topic under inquiry is to blame for such criticism.<sup>69</sup> How can autoethnography accomplish this since researchers are expected to be as detached as possible from their research to give the most objective truth possible?<sup>70</sup> According to Denzin and Lincoln, 'objective reality can never be captured. We can know a thing only through its representations'.<sup>71</sup> In this context, the depth of autoethnography is found in the discoveries that come from the interplay of the self and its own experiences, which in turn reflect the cultural and social environment in which those events occurred.<sup>72</sup> Through this depiction, comprehension of a certain phenomenon is attained.<sup>73</sup> Although this thesis can be classified as autoethnography, it also incorporates engagement with existing scholarship through desktop research and draws on various theoretical frameworks such as feminist legal theory,<sup>74</sup> critical race theory,<sup>75</sup> and critical race feminism.<sup>76</sup> This multidimensional approach allows for a nuanced exploration of the subject matter, blending personal narrative with theoretical

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<sup>66</sup> Zwane op cit note 36.

<sup>67</sup> Ibid.

<sup>68</sup> Mariza Méndez 'Autoethnography as a Research Method: Advantages, Limitations, and Criticisms' (2013) 15(2) *Colombian Applied Linguistics Journal* 279-287.

<sup>69</sup> Ibid at 284.

<sup>70</sup> Ibid.

<sup>71</sup> Ibid.

<sup>72</sup> Ibid.

<sup>73</sup> Ibid.

<sup>74</sup> Feminist legal theory challenges the notion of the law, and its many players, as a gender-neutral, unbiased executor and distributor of justice. It also demonstrates how the framework of legal discourse excludes women's voices. See Fatima Tendai Mathivha *Reflections of Rape Myths: A Discursive Analysis of the Jacob Zuma Rape Trial* (Masters Research Report, University of the Witwatersrand, 2015) 14.

<sup>75</sup> Critical race theory is the concept that race is a socially constructed category used to oppress and exploit people of colour; hence, racism is rooted in the law and legal institutions. See Lisa J Long 'The Ideal Victim: A Critical Race Theory (CRT) Approach' (2021) 27(3) *International Review of Victimology* 347.

<sup>76</sup> Critical race feminism is founded on the premise that Black women are frequently the product of interlocking systems of racism and sexism, and that these experiences are rarely represented in the discourses of feminism or anti-racism.

See Kimberlé Crenshaw 'Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color' (1991) 43 *Stanford Law Review* 1241.

perspectives and existing scholarship to contribute to a richer understanding of the complexities surrounding sexual violence and the criminal justice system.

**(f) Structure**

This thesis will be structured as follows:

Chapter 1 has introduced the reader to my research question and topic. It served as a foundation for the research.

Chapter 2 offers historical background on the colonial construction of the unrapeable Black women by exploring how rape was used as a tool for racial subjugation during the colonial and apartheid eras. It also demonstrates how the historic criminal justice system normalised Black women's rape by displacing them as victims.

Chapter 3 will examine the state's efforts to redress the historic injustices experienced during colonial and apartheid South Africa. The international and domestic human rights frameworks implemented to combat rape as well as discrimination experienced by Black women will also be explored.

Chapter 4 investigates how, despite the efforts made by South Africa's democratic system, the rape of Black women remains pervasive. Thus, it explores the concept of coloniality and the legacy of colonialism in contemporary South Africa. It also investigates how justice system actors continue to perpetuate the stereotype that Black women are unrapeable.

Chapter 5 concludes the thesis by summarising and analysing the research question. In addition, makes a case for decolonisation as a strategy to reform the criminal justice system, enabling Black rape complainants to feel heard and obtain justice.

## II. THE HISTORICAL ROOTS OF THE UNRAPEABLE BLACK WOMAN IN SOUTH AFRICA

Throughout history, the bodies of Black women have been used as objects of exploitation.<sup>77</sup> The process of enslavement, colonialism, and apartheid all created a distinct historicised space of tension, pain, and dehumanisation in the Black female body.<sup>78</sup> The racial component of rape is often ignored, and the history of how colonialists used rape to oppress and dehumanise Black women is often buried.<sup>79</sup> Rape was used as a weapon of domination and repression, as a result, rape was deeply ingrained in the colonial psyche.<sup>80</sup> According to Baderoon, it is critical not only to recognise the violence and sexual exploitation that characterised early Capetonian slaveholding society but also that strive to take seriously the ‘trauma of slavery and sexual subjection’ on which South Africa was formed.<sup>81</sup> Researchers such as Anderson have demonstrated how this history has continued into the present day by stating that ‘the brutal history of apartheid in South Africa facilitated the current rape crisis now facing the country.’<sup>82</sup> Therefore, to gain a comprehensive grasp of the prevailing conditions in South Africa, characterised by the widespread occurrence of sexual violence against Black women and girls, it is imperative to revisit a distressing and uneasy historical context.

This chapter is intended to shed light on the legacies of colonialism, slavery, and apartheid, by providing crucial historical context and assisting in explaining the racial bias that remains specifically within the criminal justice system. At first, it will examine the historical marginalisation of Black women, delving into how colonial culture fostered the stereotype of the unrapeable Black woman thereby normalising their experience of rape. Second, it seeks to explain the gendered and sexual components of colonial and apartheid South Africa, unravelling the history of gender and racial discrimination that resulted in institutional barriers and disparities for Black women. Finally, it seeks to understand the historical functioning of the criminal justice system and its role in displacing Black women as victims of rape, thereby perpetuating the colonial notion of the unrapeable Black woman.

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<sup>77</sup> Flavia Santos de Araujo “‘bein alive & bein a woman & bein colored’”: The Metaphysical Dilemma in Ntozake Shange, Sherley Anne Williams, and Toni Morrison’ (2017) 24(1), *Revista Artemis* 12.

<sup>78</sup> Myriam Moïse, “Ain’t I a Woman?” Grace Nichols and M. NourbeSe Philip. Re-Membering and Healing the Black Female Body’ (2018) 40(2) *Commonwealth Essays and Studies*.

<sup>79</sup> Zwane op cit note 36 at 41.

<sup>80</sup> Sarah Deer ‘Decolonizing Rape Law: A Native Feminist Synthesis of Safety and Sovereignty’ (2009) 24(2) *Wicazo Sa Review* 150.

<sup>81</sup> Gabeda Baderoon ‘Remembering Slavery in South Africa’, available at <https://africasacountry.com/2014/12/remembering-slavery-in-south-africa>, accessed 14 April 2023.

<sup>82</sup> Michelle Anderson ‘Rape in South Africa’ (2000) *Georgetown Journal of Gender and the Law* 790.

### (a) Colonialism

South Africa, as a settler-colonial nation, maintains ongoing ‘political, cultural, and social discourses’ about who belongs and who does not.<sup>83</sup> The foundation for this right, or lack thereof, is cultural scripts that train our notions about people’s worth and visibility.<sup>84</sup> Therefore, this thesis adopts settler-colonial theory as a framework to examine and critique the structural processes that have normalised our dominant narratives of race, gender, and class.<sup>85</sup> Given that settler-colonialism is ‘a structure and not an event’, as Patrick Wolfe puts it, the invasion of South Africa must be understood as a series of fundamental physical, structural, and symbolic violence that serves as the foundation for South Africa’s very coherence as a territory, government, and society.<sup>86</sup> According to Modiri, numerous factors characterised the settler-colonial intrusion of South Africa such as:

brutal violence, land dispossession, and exploitation of Black bodies; the arrangement of socio-economic inequality and extreme poverty; the spatial containment and segregation of indigenous and non-indigenous populations; the eradication of African cultures and ontologies; and the psychic alienation and imposed symbolic degradation of African personality.<sup>87</sup>

Therefore, it can be argued that settler colonialism paved the way for the exploitation of Black women’s bodies.<sup>88</sup>

White supremacist Europeans used the bodies of Black women to demarcate racial and gender frontiers for national identities at the beginning of colonialism.<sup>89</sup> This colonial mission was heavily based on the pseudoscience of race, which was vital to the systematic dehumanisation of Black people, thereby justifying the use of force in achieving colonial aims including invasion, enslavement, and indentured servitude.<sup>90</sup> The underpinning philosophy was grounded in the notion that individuals who were considered naturally superior, both inherently and biologically, had the right to rule over those deemed naturally inferior.<sup>91</sup> This philosophy

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<sup>83</sup> Lorien S Jordan ‘Belonging and Otherness: The Violability and Complicity of Settler Colonial Sexual Violence’ (2021) 44(3-4) *Women & Therapy*.

<sup>84</sup> *Ibid.*

<sup>85</sup> *Ibid.*

<sup>86</sup> Joel M Modiri ‘Conquest and Constitutionalism: First Thoughts on an Alternative Jurisprudence’ (2018) 34(3) *SAJHR*.

<sup>87</sup> *Ibid* at 303.

<sup>88</sup> FRIAR *op cit* note 17.

<sup>89</sup> Azille Coetzee and Louise Du Toit ‘Facing the Sexual Demon of Colonial Power: Decolonising Sexual Violence in South Africa’ (2018) 25(2) *European journal of Women’s Studies*.

<sup>90</sup> *Ibid* at 215.

<sup>91</sup> *Ibid.*

enabled colonisers to 'save' or 'civilise' inferior populations while ruthlessly exploiting their land, labour, and sexuality.<sup>92</sup> In line with this argument, Abrahams claims that white European explorers and racist scientists laid the groundwork for African oppression and enslavement.<sup>93</sup>

Maria Lugones, on the other hand, opposes a solely racialised approach, stating that specific conceptions of sex and gender were also critical to the colonial construction of racial categories.<sup>94</sup> Lugones argues that the masculine/feminine dichotomy acted as a hierarchical opposition during the colonial encounter and served as a signal of civilisation; hence, becoming 'civilised' required internalising the division along with all of its supporting norms and values.<sup>95</sup> Lugone further contends that being fully human, in the context of colonial encounters, involved clearly and unequivocally fitting into one side of this divide, acting according to its prescriptions and embodying its values.<sup>96</sup> As a result, many people associate women's enslavement and abuse with core European notions of social order.<sup>97</sup> In keeping with Lugone's theory, Oyèrónké Oyěwùmí claims that:

We can discern two vital and intertwined processes inherent to European colonisation of Africa. The first and more thoroughly documented of these processes was the racialising and the attendant inferiorisation of Africans as the colonised, the natives. The second process ... was the inferiorisation of females. These processes were inseparable, and both were embedded in the colonial situation.<sup>98</sup>

As a result, the colonial paradigm builds human subjectivity on white masculinity, and therefore the Black woman is not politically recognised as truly human and is not considered as fully possessing their body since they deviate from this ideal.<sup>99</sup> According to David Pilgrim:

The portrayal of Black women as lascivious by nature is an enduring stereotype. The descriptive words associated with this stereotype are singular in their focus: seductive, alluring, worldly, beguiling, tempting, and lewd. Historically, white women, as a category, were portrayed as models of self-respect, self-control, and modesty - even sexual purity, but black

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<sup>92</sup> Coetzee and Du Toit op cit note 89 at 215.

<sup>93</sup> Yvette Abrahams 'The Great Long National Insult: 'Science', Sexuality, and the Khoisan in the 18th and Early 19th Century' (1997) 13(32) *Agenda*.

<sup>94</sup> Maria Lugones 'Toward a Decolonial Feminism' (2010) 25(4) *Hypatia* 744.

<sup>95</sup> *Ibid.*

<sup>96</sup> *Ibid.*

<sup>97</sup> *Ibid.*

<sup>98</sup> Oyèrónké Oyěwùmí *The Invention of Women: Making an African Sense of Western Gender Discourses* (1997) 152.

<sup>99</sup> *Ibid.*

women were often portrayed as innately promiscuous, even predatory. This depiction of black women is signified by the name Jezebel.<sup>100</sup>

This portrayal of Black women's bodies gave birth to various misconceptions and notions based on our race, social class, and gender.<sup>101</sup> These ideas range from the constraints of 'being the 'performative' gender, the object of control and regulation, or the victims of sexual cruelty'.<sup>102</sup> Therefore, the next section explores how Black women became essentially unrapeable during colonial control due to our double (racial-sexual) exclusion from humanity and being considered sexually deviant and so justly conquered.<sup>103</sup>

### **(b) Rape as a Tool of Colonialisation**

Rape is more than a metaphor for colonisation; it is an integral feature of it.<sup>104</sup> Rape mirrors the worst aspects of colonisation in its attack on the body, violation of physical boundaries, and contempt for humanity.<sup>105</sup> Similarly, sexual violence and colonisation offenders rely on power and control over their victims.<sup>106</sup> Colonial conquest was predicated on the concepts of *terra nullius* and manifest destiny, wherein settlers justified their claim to the land by considering it an empty wilderness bestowed upon them by divine intervention.<sup>107</sup> Black women's bodies were perceived as an extension of the land, and their dehumanisation rendered them intrinsically vulnerable.<sup>108</sup> Therefore, Black women were *de facto terra nullius*— devoid of worth yet also wild and in need of taming.<sup>109</sup> As a result, sexual violence, rape culture, and the policing of Black women's bodies were all fostered by early colonialism, a period in which colonisers symbolically and physically asserted their authority over the lands, bodies, and minds of people they considered to be lower in status.<sup>110</sup> The establishment of binaries such as male and female, white and non-white, civilised and barbarian, during this period, became the rationale for laws that encouraged the forcible acquisition of women's bodies as chattel.<sup>111</sup>

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<sup>100</sup> David Pilgrim 'The Jezebel Stereotype - Anti-Black Imagery - Jim Crow Museum - Ferris State University' Ferris State University July 2002, available at <https://www.ferris.edu/jimcrow/jezebel/>, accessed 4 April 2023.

<sup>101</sup> FRIAR op cit note 17.

<sup>102</sup> AEquitas et al. op cit note 33.

<sup>103</sup> Gqola op cit note 6 at 50.

<sup>104</sup> Deer op cit note 80 at 150.

<sup>105</sup> Ibid.

<sup>106</sup> Ibid.

<sup>107</sup> Caren M Holmes 'The Colonial Roots of the Racial Fetishization of Black Women' (2016) 2 *Black & Gold*.

<sup>108</sup> Andrea Smith *Conquest: Sexual Violence and American Indian Genocide* (2015).

<sup>109</sup> Ashley Noel Mack and Tiara R Na'Puti "'Our Bodies are Not Terra Nullius": Building a Decolonial Feminist Resistance to Gendered Violence' (2019) 42(3) *Women's Studies in Communication* 350.

<sup>110</sup> Ibid.

<sup>111</sup> Scott Lauria Morgensen 'Theorising Gender, Sexuality and Settler Colonialism: An Introduction' (2012) 2(2) *Settler Colonial Studies*.

### *The rape of enslaved women*

As part of the colonial project colonialists established slavery and the Roman-Dutch legal system brought to the Cape fully sanctioned slavery.<sup>112</sup> According to Roman-Dutch Law, slaves were first and primarily defined as property, which was known as chattel slavery, which meant that one person was the legal property of another.<sup>113</sup> As a result, slave women were not considered human and therefore had no human rights or freedoms.<sup>114</sup> Slaves were deprived of their agency and desire; they were morally, physically, cognitively, and sexually dehumanised.<sup>115</sup> Through the established system of chattel slavery, slaves were sexualised as animals.<sup>116</sup> Enslaved women's bodies belonged to those who had captured or brought them.<sup>117</sup> Slave owners, therefore, had authority over their slaves' bodies as well as their 'productive, sexual, and reproductive labour'.<sup>118</sup> Slave women who were considered best capable of bearing children were dubbed 'breeders',<sup>119</sup> and they were purchased and sold based on their reproductive efficiency, subsequently bolstering white supremacy, patriarchy, and capitalism.<sup>120</sup> Enslaved women's economic worth in colonial South Africa was intricately tied to their sexual and reproductive worth.<sup>121</sup> Enslavers used a variety of incentives to stimulate reproduction, such as increased food and clothing allowances.<sup>122</sup>

Enslaved women were therefore treated as disposable sexual commodities as well as commercial and reproductive commodities.<sup>123</sup> Despite laws prohibiting interracial sexual relations to preserve racial purity, white slave owners routinely raped and sexually assaulted female slaves.<sup>124</sup> Slave owners' dehumanising perception of Africans did not discourage them from engaging in sexual relations with their human property.<sup>125</sup> Instead, the power relations created by slavery fuelled the sexual exploitation and rape of Black slave women since, as the

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<sup>112</sup> Pamela Scully 'Rape, Race, and Colonial Culture: The Sexual Politics of Identity in the Nineteenth-century Cape Colony, South Africa' (1995) 100(2) *The American Historical Review*.

<sup>113</sup> *Ibid.*

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

<sup>115</sup> Holmes op cit note 107.

<sup>116</sup> *Ibid.*

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

<sup>118</sup> *Ibid.*

<sup>119</sup> 'Slave women were not mothers at all; they were simply instruments guaranteeing the growth of the slave labour force. They were "breeders"—animals, whose monetary value could be precisely calculated in terms of their ability to multiply their numbers.'

See Angela Y Davis *Women, Race & Class* (1983) at 3.

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

<sup>121</sup> Holmes op cit note 107.

<sup>122</sup> *Ibid.*

<sup>123</sup> *Ibid.*

<sup>124</sup> *Ibid.*

<sup>125</sup> *Ibid.*

power imbalance inherent in slavery rendered any form of consent impossible.<sup>126</sup> Enslaved women had no choice, as they were owned as a chattel; therefore, rape was a core facet of their enslavement.<sup>127</sup> Under these conditions, bodily autonomy is impossible thus inducing further shame.<sup>128</sup> Within the institution of slavery, both Black and white men had sexual access to Black women.<sup>129</sup> White supremacy viewed Black women as sexually alluring and receptive to coitus, as a result, they were believed to never withhold sexual consent thus unrapeable.<sup>130</sup> Kovel argues that the men became fixated on Black women, portraying them as more passionate than white women, who were associated with chastity and virtue.<sup>131</sup> Black women were therefore perceived as promiscuous and morally bankrupt.<sup>132</sup> Therefore, the Black women's sexuality, accessibility, and moral laxity were believed to have triggered the rape which meant that their injuries were denied, as well as their status as victims.<sup>133</sup>

### (c) Colonial Criminal Justice Response to Rape

Elizabeth Thornberry argues that rape was considered an 'outrage' in colonial South Africa because it violated the boundaries of respectable sexuality.<sup>134</sup> This 'outrage,' however, was only worthy of a societal response if a woman could credibly claim respectability.<sup>135</sup> Various factors, including race, social background, prior sexual experience, and gender performance were all evaluated to determine the authenticity of rape allegations.<sup>136</sup> Women whose behaviour fell short of white supremacist expectations were unlikely to have their rape complaints considered seriously.<sup>137</sup> Respectability evaluations were inextricably linked to race perceptions; respectability and whiteness were mutually constitutive concepts.<sup>138</sup> As a result, the stereotype of the 'virtuous white woman' admirably compliments the colonial purpose of delivering civilisation to the savage barbarians of uncivilised regions.<sup>139</sup> In a worldwide racial

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<sup>126</sup> Holmes op cit note 107.

<sup>127</sup> Ibid.

<sup>128</sup> 'Shame is a function of oppression because it deals with who is valued and who is invisibilised. Shame is a product of dehumanisation and all systems of violent oppressive power produce shame in those they brutalise' See Gqola op cit note 6 at 38.

<sup>129</sup> Linda Meyer Williams 'Race and Rape: The Black Women as Legitimate Victim' (1986) *ERIC*.

<sup>130</sup> Ibid.

<sup>131</sup> Ibid.

<sup>132</sup> Ibid.

<sup>133</sup> Ibid.

<sup>134</sup> Elizabeth Thornberry 'Rape, Race, and Respectability in a South African Port City: East London, 1870-1927' (2016) 42(5) *Journal of Urban History*.

<sup>135</sup> Ibid.

<sup>136</sup> Ibid.

<sup>137</sup> Ibid.

<sup>138</sup> Ibid.

<sup>139</sup> FRIAR op cit note 17.

hegemony where whiteness reigns supreme, white womanhood is the gold standard around which all manifestations of womanhood and femininity revolve.<sup>140</sup> It is produced by white patriarchy as an identity that is extremely delicate and requires special care.<sup>141</sup> The purportedly chaste and virginal body of the white woman is therefore too 'pure' to be associated with sexuality.<sup>142</sup> This was reiterated by Gunne and Thompson who stated that: 'in thinking about rape, colonialism and the construction of community or national identity, it is useful to note that in a patriarchal society, racial purity and sexual purity are not mutually exclusive'.<sup>143</sup>

Thornberry notes that European colonies placed particular focus on respectability and European cultural and material norms of respectability served as the foundation for claims to social standing and political rights.<sup>144</sup> Respectability was based on both material and behavioural indicators such as:

clean houses, possibly made of brick, and appropriate attire (black suits for men, long dresses for women), church baptism and membership, temperance, Christian sexual morality, and, most importantly, the maintenance of a gendered labour system in which women did not work outside the home.<sup>145</sup>

Nevertheless, even respected women and girls who had been raped found this notion of respectability contradictory because bringing a rape charge entailed admitting to a level of sexual contact (even if non-consensual) that would ordinarily exclude a person from any claim of respectability.<sup>146</sup> However, adherence to African-specific norms of respectability became proof of a lack of civilised status which proved that respectability was tied to whiteness.<sup>147</sup> This was evidenced when the Solicitor General noted in rejecting to prosecute a particular case, stating that it is impossible to apply the intricacies of their law to those whose custom it is to abduct girls from their homes and offer them moderate and appropriate compensation in the form of a beast for such a wrongdoing.<sup>148</sup> This illustrates how complicated the nature of seeking justice for victims of sexual violence within the colonial context.

Systematically, the Solicitor General lowered Black women's sexual abuse allegations from rape or attempted rape to less serious offences like indecent assault or even simple assault,

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<sup>140</sup> Thornberry op cit note 134.

<sup>141</sup> Ibid.

<sup>142</sup> Ibid.

<sup>143</sup> Gqola op cit note 6.

<sup>144</sup> Thornberry op cit note 134 at 869.

<sup>145</sup> Ibid.

<sup>146</sup> Ibid.

<sup>147</sup> Ibid.

<sup>148</sup> Ibid.

which carried significantly lighter punishments.<sup>149</sup> This was demonstrated in a case where the police officer discovered Jack Qwali laying on top of a nine-year-old girl with ‘her dress... pulled up and her legs... exposed... with his private parts... erected’.<sup>150</sup> Ruqule, the victim, testified that the accused had placed his private part between her legs and he tried penetration.<sup>151</sup> Her uncle also told the court that even though the accused did not touch the child’s privates, he still believes the accused committed rape, and her mother indicated that her daughter was raped despite still being a virgin.<sup>152</sup> Ruqule’s family felt the sexual nature of the assault was a vital part of the harm done to their daughter.<sup>153</sup> In contrast, the Solicitor General completely disregarded the sexual element of the offence and prosecuted Jack Qwali with common assault.<sup>154</sup> The Solicitor General argued that there were practical motives for downgrading charges; by reframing rape and attempted rape as indecent assault or common assault, the cases could be tried summarily by the Resident Magistrate rather than requiring a more resource-intensive jury trial.<sup>155</sup> However, this practice reflected a tendency to devalue cases involving Black complainants rather than white complainants. It implied the belief that Black women and girls, lacking respectability, did not experience sexual assault’s devastating effects to the same extent as their more ‘respectable’ white counterparts.<sup>156</sup> This approach further perpetuated the stereotype of the ‘virtuous white women’ and the unrapeable Black women.

#### *Adjudication of rape cases*

Rape was often prosecuted in criminal courts throughout colonialism, and convictions resulted in incarceration and lashing; informal tribunals favouring compensation continued to operate, and in some instances, rape cases were heard in civil court.<sup>157</sup> Throughout the nineteenth century, Black women in the Cape brought rape charges against men.<sup>158</sup> Although the law acknowledged the possibility of Black women being victims of rape, the colonial construction of race significantly influenced every rape case within the colonial court system.<sup>159</sup> Notably,

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<sup>149</sup> Thornberry op cit note 134.

<sup>150</sup> Ibid.

<sup>151</sup> Ibid.

<sup>152</sup> Ibid.

<sup>153</sup> Ibid.

<sup>154</sup> Ibid.

<sup>155</sup> Ibid.

<sup>156</sup> Ibid.

<sup>157</sup> Elizabeth Thornberry *Colonizing Consent: Rape and Governance in South Africa’s Eastern Cape* (2019).

<sup>158</sup> Ibid.

<sup>159</sup> Ibid.

the historical record reveals a glaring absence of convictions against white men for sexually violating Black women and girls.<sup>160</sup> It is crucial to recognise that this omission does not imply a lack of as a lack of such incidents but rather suggests potential disregard for Black women's complaints within colonial courts.<sup>161</sup> Political activists Sol Plaatje and Walter Rubusana argued that the widespread knowledge of 'white peril'<sup>162</sup> indicated a rampant occurrence of sexual violence by white males against Black women in the African community.<sup>163</sup> Throughout colonial history, white men have systematically raped Black women as a tool of domination.<sup>164</sup> Those in vulnerable positions, such as shop assistants, domestic workers, or agricultural labourers, were more susceptible to sexual advances from their bosses.<sup>165</sup> Despite these realities, there was a prevailing belief among Africans that white males would not be punished for raping Black women and felt a sense of unfairness, therefore, a miscarriage of justice occurred.<sup>166</sup>

As mentioned above, it is likely that colonial courts simply ignored Black women's complaints; in 1912, Dr Abdullah Abdurahman, leader of the African People's Organisation, cited a case in which this occurred:

a coloured woman was assaulted... She went to a well-known doctor and was examined... She went to the Police Station with her husband, and they laughed at her. She saw a young clerk but got no further. She came to see me, and I wrote to the Government and the reply I got was that the department did not intend taking any steps.<sup>167</sup>

The failure of the colonial state to respond to the rape of the coloured woman reinforces the notion of the unrapeable Black woman. W. C. Scully, who served as a magistrate reiterated this idea by stating the following:

I do not think that black girls would feel an assault equally with white girls since I do not think that the black girl's sense is so keen. It would not be the moral shock that it would be to one of our class.<sup>168</sup>

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<sup>160</sup> Thornberry op cit note 157.

<sup>161</sup> Ibid.

<sup>162</sup> The term 'white peril' refers to the rape and sexual exploitation of Black women by white men. See Thornberry op cit note 157.

<sup>163</sup> Ibid.

<sup>164</sup> Ibid.

<sup>165</sup> Ibid.

<sup>166</sup> Ibid.

<sup>167</sup> Ibid.

<sup>168</sup> Thornberry op cit note 134 at 872.

As a result, this concept of credibility was linked to European concepts of respectability, which favoured specific forms of female sexuality that most Black women did not conform to.<sup>169</sup> It can therefore be argued that legal protection was offered to women who were closely related to whiteness. This became particularly evident in the case of Lena July, a Xhosa woman who married her husband using Christian rites and declared that she was ‘a woman of good character’ in her testimonial to prove her respectability.<sup>170</sup> This strategic move resulted in the conviction of her rapists and sentenced to two years of hard labour, despite their assertion that she consented to sex in exchange for money.<sup>171</sup>

Noyanti, another Black complainant, who stayed close to the Newlands Mission Station, stressed that she was dressed in European attire at the time of her attack.<sup>172</sup> As a result, her attackers were charged.<sup>173</sup> Both these women’s claims of respectability were effective because they alluded to categories accepted by government officials, like Christianity, marriage, and European clothing in line with white supremacy.<sup>174</sup> Additionally, Black women profited from the tendency of the courts to see Black men as monsters.<sup>175</sup> However, even if Black women who accused Black men of sexual assault were more likely to be believed, they still had to contend with the fact that rape allegations required an admission of sex, which might impair a woman’s dignity.<sup>176</sup> As a result, Black women who had undergone extraordinarily violent attacks in various interracial sexual assault cases were adamant that they had not been raped.<sup>177</sup> Adelaide Matzke told the magistrate that her attacker tried but failed to rape her after she was violently attacked.<sup>178</sup> Matzke, in her testimony, affirmed that she was certain she was not raped and refused to be examined by her mother or a doctor since ‘there was no need’.<sup>179</sup> Black women were thus afraid to admit to having had sexual contact with a Black man, even if it was violent and non-consensual.<sup>180</sup>

As Pamela Scully has demonstrated, both Black and white rape victims in the nineteenth century were required to assert their respectability to seek legal protection, but

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<sup>169</sup> Thornberry op cit note 134 at 868.

<sup>170</sup> Ibid at 870.

<sup>171</sup> Ibid.

<sup>172</sup> Ibid.

<sup>173</sup> Ibid.

<sup>174</sup> Ibid.

<sup>175</sup> Ibid at 873.

<sup>176</sup> Ibid at 874.

<sup>177</sup> Ibid.

<sup>178</sup> Ibid.

<sup>179</sup> Ibid.

<sup>180</sup> Ibid.

respectability judgments were inextricably linked to the notion of race; respectability and whiteness were mutually essential categories.<sup>181</sup> The colonial depiction of Black women as hypersexual and morally corrupt meant that Black women had to establish their proximity to whiteness for their rape complaints to be heard and believed. Their credibility and respectability were determined by how closely they resembled white women. According to Gqola, this is because ‘race and rape have historically intersected in mutually reinforcing ways’.<sup>182</sup> As a result, rape for Black women was and remains deeply rooted in racial issues as it is in gender issues.<sup>183</sup> In the next section, we will explore how the denial or dismissal of harm suffered by Black women continued into Apartheid.

#### **(d) Apartheid**

The system of racial segregation and domination of the African and other non-white inhabitants of South Africa by white settlers from 1948 to 1994 was known as apartheid, which is an Afrikaans word meaning ‘separation’ and essentially a continuation of colonialism.<sup>184</sup> The system was founded on the colonisation and slavery of the nation’s past.<sup>185</sup> White settlers had always considered Black South Africans a natural resource to be exploited to industrialise the country.<sup>186</sup> The National Party enacted white supremacist policies that privileged white South Africans derived from Dutch and British settlers in South Africa while progressively disenfranchising Black Africans.<sup>187</sup> Non-white South Africans were refused citizenship, tyrannised, and deprived of voting rights during the Apartheid era.<sup>188</sup> This was in line with The Rome Statute of the International Criminal Court (ICC Rome Statute) definition for the crime of apartheid in Article 7(2)(h):

Inhumane acts ... committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime.<sup>189</sup>

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<sup>181</sup> Scully op cit note 112.

<sup>182</sup> Gqola op cit note 6.

<sup>183</sup> Angela P Harris ‘Race and Essentialism in Feminist Legal Theory’ (1990) 42 *Stanford Law Review* 598.

<sup>184</sup> BDS Movement ‘Colonialism And Apartheid’ available at <https://bdsmovement.net/colonialism-and-apartheid/understanding-apartheid>, accessed 11 March 2023.

<sup>185</sup> Ibid.

<sup>186</sup> Erin Blakemore ‘The Harsh Reality Of Life Under Apartheid In South Africa’ *History* 10 September 2021, available at <https://www.history.com/news/apartheid-policies-photos-nelson-mandela>, accessed 13 November 2022.

<sup>187</sup> Ibid.

<sup>188</sup> Ibid.

<sup>189</sup> The Rome Statute of the International Criminal Court (*last amended 2010*) 17 July 1998.

Apartheid served as a tool to systematically curtail the involvement of women, particularly African women, in various spheres of life, essentially relegating them to second-class citizens.<sup>190</sup> This oppressive regime was characterised by discriminatory practices in employment and education opportunities, as well as restrictions on housing, health care, transportation, and economic possibilities based on a person's gender or race.<sup>191</sup> Sisonke Msimang contends that these living circumstances had enormous impacts on Black women's private and public lives, with the state's support of violence and the society's patriarchal conservatism exacerbating these effects.<sup>192</sup>

### **(e) Rape as a Tool of Apartheid**

During apartheid, rape was not only used as a method of repression but also as a tool to regulate the white minority and sow seeds of dread and mistrust throughout the nation, giving rise to the term 'black peril'.<sup>193</sup> The perceived threat to white women was utilised to support laws that required residential segregation, pass laws for Black people, and a variety of racial discrimination.<sup>194</sup> While there is minimal evidence that points to and evaluates if sexual violence was perpetrated deliberately against large groups of women, however, the structural and systemic violence created a conducive environment for the widespread sexual violence and rape of women.<sup>195</sup> Research in South Africa has uncovered links between violent masculinities and the high incidence of sexual violence against women.<sup>196</sup> According to Chikwira, the history of apartheid may have contributed to the formation of violent masculinities, which are worth exploring briefly as they seem to be linked to sexual violence.<sup>197</sup> During this period, interpersonal violence was frequently morally justified and suppressed, contributing to the formation of violent masculinities that largely went unquestioned and

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<sup>190</sup> Reitumetse Obakeng Mabokela and Kaluke Felicity Ntwanano Mawila 'The Impact of Race, Gender, and Culture in South African Higher Education' (2004) 48(4) *Comparative Education Review*.

<sup>191</sup> Ibid at 396.

<sup>192</sup> Ibid.

<sup>193</sup> 'Black Peril' was the perceived fear that black men posed the threat of raping white women which was also known as 'swaart gevaar'.

See Thornberry op cit note 157.

<sup>194</sup> Ibid at 874.

<sup>195</sup> Sue Armstrong 'Rape in SouthF Africa: An Invisible Part of Apartheid's Legacy' (1994) 2(2) *Gender & Development* 35-39.

<sup>196</sup> René Chikwira 'Constructions of Sexual Violence Against Women in the Apartheid Printed News Media' (Honours paper, University of Cape Town, 2016) 2.

<sup>197</sup> Ibid.

unpunished.<sup>198</sup> Furthermore, patriarchy, the norm in South Africa's apartheid society, was used to legitimise sexual violence against women.<sup>199</sup>

During apartheid, rape was rampant and occurred in both the public and private spheres of women's lives.<sup>200</sup> Women and girls were subjected to rape and sexual assault, even within the confines of their homes, whilst the apartheid regime's violence against men reinforced the patriarchy.<sup>201</sup> The female body, and hence sexuality, represented a type of wealth that males controlled, allowing men to demonstrate and express their dominance and superior status within the townships' political and social hierarchies.<sup>202</sup> This dynamic was underscored in Catherine Campbell's research on violence and masculinity in Natal which revealed that when opportunities for asserting masculine power became scarce, violence became a manifestation of patriarchal structural forces reasserting themselves, especially at a time when racism and class inequality had dealt men a particularly severe blow to their status.<sup>203</sup> Girls who were victims of sexual violence outside their homes were frequently targeted by street fighters as a means of preventing women from participating in the public realm beyond their homes.<sup>204</sup> There were also indications that security personnel may have sanctioned rape or utilised it to terrorise, intimidate, and punish women and their communities.<sup>205</sup> This served as a means of maintaining control over women's bodies, instilling fear and suppressing their agency, echoing colonial tactics.

### *The rape of Black women during apartheid*

Rape, however, was rarely taken seriously when it occurred to poor Black women, as it was viewed as an everyday occurrence whether perpetrated by white or Black men.<sup>206</sup> Rooted in the extension of colonialism, the warped concept of the 'mythical rapist and mythical whore' remained prevalent in South Africa.<sup>207</sup> In response to the racist and absent law enforcement

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<sup>198</sup> Chikwira op cit note 192 at 2.

<sup>199</sup> Ibid.

<sup>200</sup> The Gender Security Project 'CRSV: South Africa during Apartheid' available at <https://www.gendersecurityproject.com/post/crsv-south-africa-during-apartheid>, accessed 14 April 2023.

<sup>201</sup> Ibid.

<sup>202</sup> Kunle Oparinde & Rachel Matteau Matsha 'Powerful Discourse: Gender-Based Violence and Counter-Discourses in South Africa' (2021) 8(1) *Cogent Arts & Humanities*.

<sup>203</sup> Catherine Campbell 'Learning to Kill? Masculinity, the Family and Violence in Natal' (1992) 18(3) *Journal of Southern African Studies* 614-628.

<sup>204</sup> Ibid at 38.

<sup>205</sup> Sheila Meintjes and Beth Goldblatt 'Gender and the Truth and Reconciliation Commission: A Submission to the Truth and Reconciliation Commission' (1996) *University of Witwatersrand* 17.

<sup>206</sup> Hirschauer op cit note 50.

<sup>207</sup> Ibid.

and justice system, the country's Black majority established its own legal processes.<sup>208</sup> Townships established so-called 'people's courts', handling issues such as Soweto's widespread 'jackrolling'<sup>209</sup> or the serial gang-rape of children and young women in the 1980s.<sup>210</sup> These informal courts imposed various sanctions in a quasi-justice setting, including restitution to the rape complainant's family or physical punishment.<sup>211</sup> However, these alternative legal systems served mainly to represent a displaced social order rife with gender biases.<sup>212</sup> They reinforced gendered and sexist preconceptions that had long been accepted culturally and socially.<sup>213</sup> As an example, women suspected of being informers were forced to walk around the streets naked, a practice known as 'modelling'.<sup>214</sup>

This was also demonstrated by how a Black woman's existence was deemed worthless, and her experiences of violence were meaningless because whether they were civilians or members of the guerrilla forces, Black women were routinely raped by the South African Defence Force (SANDF).<sup>215</sup> Black women faced danger not just from the opposing forces but also from their allies, even in the ANC camps, who frequently subjected them to rape or harassment.<sup>216</sup> The comrades were also known to threaten the rape victim's relatives and rarely reprimanded one of their own.<sup>217</sup> Out of devotion to the larger struggle against apartheid, this abuse was not disclosed by victims.<sup>218</sup> Therefore, the growth of rape and sexual violence rates against Black women and the social and governmental silence around it was interwoven with the apartheid system's racial injustice.<sup>219</sup> Black South African rape victims in exile were acutely aware of the need not to connect particular human rights crimes by select ANC members with apartheid's systemic violations in their testimonies or sell out or denounce their comrades.<sup>220</sup> As both the rape victim and perpetrator were frequently public personalities,

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<sup>208</sup> Hirschauer op cit note 50.

<sup>209</sup> The Jackrollers gang was notorious for abducting and raping women in Soweto in the late 80's. See Faranaaz Parker 'Gang rape: South Africa's endemic problem' *The Mail & Guardian* 7 May 2012 at 1, available at <https://mg.co.za/article/2012-05-07-how-gang-rape-is-the-norm-in-south-africa/>, accessed 16 April 2023.

<sup>210</sup> Hirschauer op cit note 50.

<sup>211</sup> Ibid.

<sup>212</sup> Ibid.

<sup>213</sup> Ibid.

<sup>214</sup> Ibid.

<sup>215</sup> Hannah Britton 'Organising Against Gender Violence in South Africa' (2006) 32(1) *Journal of Southern African Studies* 149.

<sup>216</sup> Hirschauer op cit note 50.

<sup>217</sup> Ibid.

<sup>218</sup> Ibid.

<sup>219</sup> *ibid.*

<sup>220</sup> Ibid.

women were aware of the gendered power hierarchies at play and whose account was likely to be believed about sexual abuse at the hands of comrades.<sup>221</sup>

#### **(f) Apartheid Criminal Justice System Response to Rape**

Hirschauer argues that ‘during apartheid, rape, the political grammar of rape, and gendered othering were equally evident, but only less visible’.<sup>222</sup> Through apartheid’s harsh political frameworks, rape was effectively silenced.<sup>223</sup> He further argues that the lack of visibility was intricately intertwined with the state’s institutionalised racism, warped law enforcement, and judicial accountability.<sup>224</sup> This invisibility played a role in reinforcing the meta-political narrative of the white South African administration, which was aimed to undermine the political effectiveness of the country’s Black majority.<sup>225</sup> During apartheid, the police force was more concerned with suppressing political dissents and controlling Black communities rather than providing secure neighbourhoods.<sup>226</sup> In Black neighbourhoods, these skewed judicial and law enforcement roles generated impermeable landscapes of lawless, self-regulation, and entrenched gendered zones.<sup>227</sup> For years, Black women had limited legal options for holding rapists accountable.<sup>228</sup> According to Reganass, if a rape complainant was Black, their case was not taken as seriously as it would have been if they were a white woman.<sup>229</sup>

During apartheid, sexual violence statistics were unclear, in part since homeland data were reported separately from those in the rest of the country.<sup>230</sup> People’s inherent mistrust of the apartheid state and the absence of legal accountability contributed to the underreporting of rape.<sup>231</sup> Within the Black community, the underreporting and secrecy regarding the scourge of rape were perpetuated by the political fabric of solidarity among Africans toward the shared aim — the anti-apartheid struggle.<sup>232</sup> Black women were often hesitant to visit the police station because in those days, simply being seen near a police station may lead to accusations of being an informant, the destruction of one’s home, or even death.<sup>233</sup> How could Black women then

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<sup>221</sup> Hirschauer op cit note 50.

<sup>222</sup> Ibid.

<sup>223</sup> Ibid.

<sup>224</sup> Ibid.

<sup>225</sup> Ibid.

<sup>226</sup> Ibid.

<sup>227</sup> Ibid.

<sup>228</sup> Ibid.

<sup>229</sup> Armstrong op cit note 195.

<sup>230</sup> Ibid.

<sup>231</sup> Hirschauer op cit note 50.

<sup>232</sup> Ibid.

<sup>233</sup> Ibid.

trust police officers - some of whom held dismissive attitudes to rape, and some of whom were proud rapists themselves - to help them when they had been raped by non-police men?<sup>234</sup> In addition, due to apartheid's relentless assault on Black lives, police stations were not places Black people wanted to be around for any reason.<sup>235</sup>

Apartheid in South Africa effectively racialised the political narrative of rape, but the marginalisation of rape as a strictly private and domestic concern transcended racial lines.<sup>236</sup> While rape became front-page news in South Africa in the mid-1970s and sparked conversation in both white and Black communities, the treatment of sexual violence in the township by the police reflected deeply ingrained biases.<sup>237</sup> In the townships, the police adhered to the now-debunked rape myth, labelling Black women who reported rape as liars.<sup>238</sup> Colonel PJ Visser, the Chief of the Soweto Criminal Investigation Department (CID), went as far as asserting in 1977 that 100 women were raped in Soweto every month.<sup>239</sup> Visser went on to say that a considerable number of rapes are false allegations made by women who sleep outside of their marital beds.<sup>240</sup> According to Visser, women fabricated rape claims to clear their names, and the 'unfaithful' group accounted for 80% of rapes.<sup>241</sup> To further justify their questionable practices, Soweto CID Chief Brigadier JJ Viktor argued between 1982 and 1985 that many reported cases were false and it was a strategy adopted by girls found staying over at the homes of their lovers.<sup>242</sup> As a result, the Soweto police department squandered an opportunity to successfully combat rape by portraying Black women as prone to lying about rape during a critical period of Apartheid, when rape rates were increasing and communities sought answers.<sup>243</sup> Instead, the police's statements alienated Black women, urged them not to report rapes, and reinforced a major rape myth for Black women which further eroded trust in law enforcement within these communities.<sup>244</sup>

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<sup>234</sup> Gqola op cit note 6.

<sup>235</sup> Ibid.

<sup>236</sup> Hirschauer op cit note 50.

<sup>237</sup> Erin Hazan and Emily Bridger 'The Myth of the Lying Woman: Historical Legacies of Rape Claims and Racialised Assumptions in South Africa' South Africa's Hidden Wars 18 March 2021, available at <https://hiddenwar.exeter.ac.uk/2021/03/18/the-myth-of-the-lying-woman-historical-legacies-of-rape-claims-and-racialised-assumptions-in-south-africa/>, accessed 17 April 2023.

<sup>238</sup> Ibid.

<sup>239</sup> Ibid.

<sup>240</sup> Ibid.

<sup>241</sup> Ibid.

<sup>242</sup> Ibid.

<sup>243</sup> Hazan and Bridger op cit note 237.

<sup>244</sup> Ibid.

### *Adjudication of rape trials*

Hazan and Bridger have argued that the colonial preconceptions concerning Black women, as indicated above, had long-term and negative ramifications for Black rape complainants during the Apartheid era.<sup>245</sup> They point to a specific instance in 1972 where Justice Hiemstra presided over two rape cases that were similar in circumstance: both involving young female victims around the age of 15 and in both cases, young Black male rapists who used weapons to threaten their victims.<sup>246</sup> However, the outcomes of the cases diverged significantly. In the case involving a white victim, the perpetrator received a 10-year prison sentence, while the other involved an African victim and the perpetrator received only four years.<sup>247</sup> Hiemstra denied that the discrepancy in punishment was due to race and explained that his reasoning was based on a variety of variables that were all plainly tied to racial and class stereotypes.<sup>248</sup> In his explanation, he emphasised that the white girl had been a virgin before being attacked.<sup>249</sup> Hiemstra further explained that the Black girl, in this case, is ‘someone who has previously had relations with a man. She denied it in court, but I do not trust her,’ thus portraying the African girl as both a liar and more promiscuous than her white counterpart in line with the colonial conception of Black women.<sup>250</sup> This case highlights the pervasive racial and gender stereotypes that influenced judicial decisions during the Apartheid era, contributing to an unjust and discriminatory legal system for Black rape complainants.

#### **(g) Conclusion**

The history of our country offers a picture in which Black women are essentially pre-packaged as evil and hypersexual women, with such gender/race constructs giving rise to cultural tropes about good women who can be raped and bad women who cannot.<sup>251</sup> The Black female form has been associated with various damaging stereotypes in European culture, including being ‘sexually deviant, primitive, subhuman, hypersexual, and an uncontrollably erotic creature’ and consequently unrapeable under the perverse white male gaze.<sup>252</sup> This construction of Black women as ‘bad’ women is based on their race (with promiscuity and unreliable characteristics related to race), as opposed to the construction of ‘bad’ white women, which is based on their

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<sup>245</sup> Hazan and Bridger op cit note 237.

<sup>246</sup> Ibid.

<sup>247</sup> Ibid.

<sup>248</sup> Ibid.

<sup>249</sup> Ibid.

<sup>250</sup> Ibid.

<sup>251</sup> FRIAR op cit note 17 at 1.

<sup>252</sup> Ibid.

sex as well as their social/sexual practices.<sup>253</sup> Ideas of respectability and credibility were linked to white supremacist ideals and required a victim to conform to those norms to prove sexual innocence. Therefore, the ability of society to neutralise rape against Black victims by rejecting the perpetrator's guilt, denying that the assault hurt the Black woman, and denying that such assaults constitute victimisation of Black women was a significant factor in perpetuating the narrative of the unrapeable Black woman.<sup>254</sup> Historically, this was also been maintained by a criminal justice system that differed in the treatment of white and Black rape victims.<sup>255</sup> In the following chapter, we will examine the numerous human rights frameworks designed to address the historical injustices suffered by Black rape victims in colonial and apartheid South Africa.

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<sup>253</sup> FRIAR op cit note 17 at 1.

<sup>254</sup> Williams op cit note 129.

<sup>255</sup> Ibid.

### III. THE HUMAN RIGHTS FRAMEWORK ENACTED TO COMBAT THE HISTORICAL INJUSTICE

For many Black South Africans, especially Black women, 1994 was a year of great success as it marked the end of apartheid and the ushering in of a new democracy that spoke directly about undoing not just racial oppression but also taking women seriously and recognising the necessity of celebrating the full spectrum of gender and sexual rights.<sup>256</sup> As mentioned in the previous chapter, Black women were confined to an inferior societal position and denied numerous human rights due to the patriarchal and racist legal structure in place under apartheid and colonialism.<sup>257</sup> Black women were denied their right to social equality because of their gender, race, and socioeconomic status under these oppressive regimes.<sup>258</sup> Black women were also conditioned to accept this racial and gender bias as inevitable and were denied the same legal protection as other citizens.<sup>259</sup> Therefore, since 1994, the South African government has established several laws designed to promote equality between women and men, regardless of race, class, or gender, to reverse the historical trend of discrimination and marginalisation of women.<sup>260</sup> The new democratic era infused hope and the promise of equal opportunity marked the start of a new era in which they could live without fear of discrimination.<sup>261</sup>

The democratic ideals of South Africa require nothing less than the protection of all human rights.<sup>262</sup> This was echoed by Nelson Mandela when he said: ‘we enter into a covenant that we shall establish the society in which all South Africans, black and white, will be able to walk tall without any fear in their hearts, secure of their intrinsic right to human dignity’.<sup>263</sup> Current legislation and state interventions are designed to advance gender and racial equality, particularly for Black women, and create a society free of sexism and racism. It is beyond the scope of this thesis to explore all the state interventions the South African government has implemented in the fight for equality. Instead, the purpose of this chapter is to consider the role of the state in the fight against sexual violence, its constitutional, international, and regional

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<sup>256</sup> Ashley J Moore ‘Endangered Species: Examining South Africa’s National Rape Crisis and its Legislative Attempt to Protect its Most Vulnerable Citizens’ (2005) 38 *Vand. J. Transnat’l L.* 1469.

<sup>257</sup> *ibid.*

<sup>258</sup> *Ibid.*

<sup>259</sup> *Ibid.*

<sup>260</sup> Ellen Kornergray ‘South Africa’s National Policy Framework for Women’s Empowerment and Gender Equality, Prepared by: The Office on the Status of Women’ (1999) *Statistics* at 9.

<sup>261</sup> *Ibid.*

<sup>262</sup> People Opposing Women Abuse (POWA) and AIDS Legal Network (ALN) ‘Criminal injustice: violence against women in South Africa’ (2010) *Shadow report on Beijing* 5.

<sup>263</sup> South African Government ‘President Nelson Mandela: 1994 Presidential Inauguration’ 10 May 1994, available at <https://www.gov.za/statement-president-african-national-congress-nelson-mandela-his-inauguration-president-democratic>, accessed 28 March 2023.

human rights obligations in terms of the ratified treaties and other legal instruments regarding the protection and promotion of human rights.

### **(a) The Constitution**

South Africa is a constitutional republic with a supreme Constitution and a Bill of Rights which means that all laws must follow the Constitution.<sup>264</sup> The legal system of South Africa is a combination of 'Roman-Dutch civilian law, English common law, customary law, and religious personal law'.<sup>265</sup> The history of colonial rule in South Africa under successive Dutch and English governance demonstrates the Roman-Dutch civilian law and English common law influence.<sup>266</sup> The drafting of a new Constitution for a democratic South Africa was the most significant component of our country's transformation.<sup>267</sup> The Interim Constitution of 1993 and the Republic of South Africa Constitution of 1996 ushered in a new constitutional order in which the Constitution became the country's supreme legislation.<sup>268</sup> Section 7(1) states that the Bill of Rights is the cornerstone of South African democracy and enshrines all people's rights in our society and upholds the democratic values of human dignity, equality, and freedom.<sup>269</sup> These processes were put in place to cope with the legacy of apartheid and to make amends for previous transgressions.<sup>270</sup> Dullah Omar noted that the newly drafted Constitution provided:

a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering, and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief, or sex.<sup>271</sup>

This idea was reiterated by the late former Chief Justice Mahomed who stated:

In some countries, the Constitution only formalises, in a legal instrument, a historical consensus of values and aspirations that evolved incrementally from a stable and unbroken past to accommodate the needs of the future. The South African Constitution is different: it retains from the past only what is defensible and represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and

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<sup>264</sup> George Wille, François du Bois, and Graham Bradfield *Wille's Principles of South African law* (2007).

<sup>265</sup> *Ibid.*

<sup>266</sup> *Ibid.*

<sup>267</sup> The Republic of South Africa 'National Action Plan to Combat Racism, Racial Discrimination, Xenophobia and Related Intolerance' (2019) para 18.

<sup>268</sup> *Ibid.*

<sup>269</sup> Constitution of The Republic of South Africa Act 108 of 1996.

<sup>270</sup> Republic *op cit* note 267.

<sup>271</sup> Dullah Omar 'Introduction by the Minister of Justice Mr Dullah Omar: The Truth and Reconciliation Commission', available at <https://www.justice.gov.za/trc/legal/justice.htm>, accessed 28 March 2023.

repressive, and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos expressly articulated in the Constitution. The contrast between the past which it repudiates and the future to which it seeks to commit the nation is stark and dramatic.<sup>272</sup>

### **(b) Rape as a Human Rights Violation**

This dream and hope of a new South Africa is betrayed by the ongoing rape of Black women which is a human rights violation and threatens our democracy.<sup>273</sup> The current international human rights framework and jurisprudence recognise rape as human rights violation and a type of gender-based violence against women and children that may be comparable to torture.<sup>274</sup> Rape can also be classified as a war crime, a crime against humanity, or a constitutive act of genocide under international humanitarian and criminal law when the other elements of the crimes are present.<sup>275</sup> According to Pedro Mzileni:

Rape is not sex. Rape is not sex gone wrong. Rape is not violent sex. Rape is violence. Rape is violence because it is a force intended to hurt, damage, dehumanise and kill someone. Rape is violence used to authorise and maintain power and control over another person. Rape is violence used to replicate an imbalance of power between the abuser and the abused.<sup>276</sup>

Therefore, the rising political and social transformation in South Africa demands that the new administration take immediate and decisive action to eliminate these gender and racial human rights violations.<sup>277</sup> The Criminal Law (Sexual Offences and Related Matters) Act (Sexual Offences Act) states a commitment to enacting measures to enable the necessary state organs to implement the Act's provisions fully and to battle and, eventually, eradicate the relatively high occurrences of sexual offences perpetrated in the Republic.<sup>278</sup> This is in line with international legislation such as the Declaration on the Elimination of Violence Against

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<sup>272</sup> *S v Makwanyane and Another*, 1995 (6) BCLR 665 par 262.

<sup>273</sup> POWA and ALN op cit note 262.

<sup>274</sup> Rashida Manjoo 'Report of United Nations Special Rapporteur on violence against women, its causes and Consequences' (2013) *Human Rights Council UN Doc. A/HRC/23/49*.

<sup>275</sup> *Ibid*.

<sup>276</sup> Pedro Mzileni 'Sexual Violence As A Weapon Used To Terminate The Citizenship Of Black Women: The Case Of Gqola's 'Female Fear Factory' *Black Pen Critique* 10 January 2017, available at <https://pedromzileni.wordpress.com/2017/01/10/sexual-violence-as-a-weapon-used-to-terminate-the-citizenship-of-black-women-the-case-of-gqolas-female-fear-factory/>, accessed on 3 April 2023.

<sup>277</sup> POWA and ALN op cit note 262 at 5.

<sup>278</sup> The Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

Women (DEVAW) of 1993 which defined how governments should work to eliminate violence and protect women's rights.<sup>279</sup>

States are required under DEVAW to use due diligence to prevent, investigate, and punish acts of violence against women.<sup>280</sup> Under the Beijing Declaration and Platform for Action, governments are obligated to fulfil the strategic objectives of the 12 agreed-upon areas of concern for women.<sup>281</sup> The Declaration establishes the following strategic goals:

- a) Promoting and protecting the human rights of women through the full implementation of all human rights instruments, especially the CEDAW
- b) Ensuring equality and non-discrimination under the law and in practice
- c) Achieving legal literacy.<sup>282</sup>

In addition, the United Nations Special Rapporteur on Violence against Women addressed the issue of state responsibility for eliminating violence against women in her report from 2013.<sup>283</sup> The report states that 'a state may incur responsibility where there is a failure to exercise due diligence to prevent or respond to certain acts or omissions of non-State actors'.<sup>284</sup>

### (c) Equality

The Constitution emphasises that the decades of systemic racial and gender inequality entrenched by apartheid and colonisation cannot be eradicated without proactive action.<sup>285</sup> Russell attributed rape to unequal social situations and the male monopoly on power when she stated that: 'eradicating rape requires getting rid of the power discrepancy between men and women because abuse of power flows from unequal power'.<sup>286</sup> In a patriarchal society, raping women is a violent means of asserting control and confirming their subservient status.<sup>287</sup> Section 9 of the Constitution aims to redress this and states that all individuals should have

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<sup>279</sup> The Declaration on the Elimination of Violence Against Women (DEVAW) of 1993.

<sup>280</sup> Ibid.

<sup>281</sup> The Beijing Declaration and Platform for Action of 1995.

These areas of concern are as follows: (1) women and poverty; (2) education and training of women; (3) women and health; (4) violence against women; (5) women and armed conflict; (6) women and the economy; (7) women in power and decision-making; (8) institutional mechanisms; (9) human rights of women; (10) women and media; (11) women and the environment; (12) the girl child.

<sup>282</sup> Ibid.

<sup>283</sup> Manjoo op cit note 274.

<sup>284</sup> Ibid at 4.

<sup>285</sup> *Makwanyane* supra note 272.

<sup>286</sup> Diana EH Russell *The Politics of Rape: The Victim's Perspective* (1975) 265.

<sup>287</sup> Natalie Browes 'How gender inequalities fuel rape in war' *Dr. Dennis Mukwege Foundation*, available at <https://www.mukwegefoundation.org/2017/03/gendernorms-rape-war-sexual-violence>, accessed 28 March.

equal opportunities to realise their full potential.<sup>288</sup> Section 9 of the Constitution establishes equality before the law in Section 9(1) and full and equal enjoyment of rights and freedoms including the requirement that equality be promoted via legislation in Section 9(2).<sup>289</sup> The right seeks genuine equality by guaranteeing that all members of society have equal access to opportunities.<sup>290</sup> The Constitution mandates that we examine the effect of discrimination on individuals to determine whether it promotes or hinders the achievement of equality and opportunity.<sup>291</sup> The Vienna Declaration and Programme of Action of 1993 recognise women's human rights as an inherent and inseparable component of universal human rights.<sup>292</sup>

### *Non-discrimination*

Discrimination and prejudice harm not only people who are discriminated against but also society as a whole.<sup>293</sup> Section 9(3) of the Constitution prohibits unfair discrimination based on, among other things, 'gender, sex, pregnancy, marital status, ethnic or social origin, sexual orientation, and culture'.<sup>294</sup> This is in line with the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) which protects all women and requires all states to ensure that the principle of equal rights for men and women is enshrined in their constitutions and that they take all necessary measures to outlaw discrimination against women.<sup>295</sup> Additionally, states must not only avoid discriminatory behaviours but also take action to eradicate prejudice against women that individuals or organisations perpetrate.<sup>296</sup> Article 13 of CEDAW requires state parties to ensure women enjoy equal rights in political, economic, and social spheres.<sup>297</sup> To support this view, the Constitutional Court in *Hugo* ruled that discrimination, stereotyping, and prejudice that strip individuals or groups of their inherent worth as human beings violate the country's equality provisions.<sup>298</sup>

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<sup>288</sup> We, The People South Africa 'The Founding Provisions - Our Constitution', available at <https://ourconstitution.wethepeoplesa.org/south-african-constitution/the-founding-provisions/>, accessed 26 November 2022.

<sup>289</sup> Ibid.

<sup>290</sup> Ibid.

<sup>291</sup> Ibid.

<sup>292</sup> The Vienna Declaration and Programme of Action of 1993.

<sup>293</sup> Legal Resources Centre 'Equality & Non-Discrimination', available at <https://lrc.org.za/our-work/equality-non-discrimination/>, accessed 21 March 2023.

<sup>294</sup> The Constitution of The Republic of South Africa Act 108 of 1996.

<sup>295</sup> Article 2(a) and (d) of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).

<sup>296</sup> Article 2(d) and (e) CEDAW.

<sup>297</sup> Article 13 of CEDAW.

<sup>298</sup> Lea Mwambene and Maudri Wheal 'Realisation or Oversight of a Constitutional Mandate? Corrective Rape of Black African Lesbians in South Africa' (2015) 15(1) *African Human Rights Law Journal*.

Article 3 of the International Covenant on Civil and Political Rights (ICCPR) also outlaws sex discrimination, requiring state parties to ensure men and women have equal access to all the Covenant's civil and political rights.<sup>299</sup> The Human Rights Committee stated unequivocally that Article 3 is violated when a person is denied full and equal enjoyment of any right.<sup>300</sup> The Committee specifically noted violence against women as a problem that undermines women's right to enjoy ICCPR rights to equality in its entirety.<sup>301</sup> Furthermore, Article 26 of the ICCPR contains an essential provision about governments' obligations to provide equality before the law and equal treatment under the law for all people.<sup>302</sup> Additionally, the legally binding regional Southern African Development Community (SADC) Protocol on Gender and Development, signed in 2008, is a significant step towards empowering women, eliminating discrimination, and realising gender equality and equity.<sup>303</sup> The African 'Banjul' Charter on Human and People's Rights of 1985 binds South Africa and Article 18(3) indicates that the state also has a duty to be responsible for eliminating discrimination against women and protecting their rights.<sup>304</sup>

Moreover, The Preamble of the Promotion of Equality and Unfair Discrimination Act (PEPUDA) affirms South Africa's commitment to promoting equality and non-discrimination.<sup>305</sup> The Act's interpretation is also unambiguous in that it mandates giving the Constitution effect to safeguard and advance the rights of those disadvantaged by current forms of discrimination.<sup>306</sup> This Act recognises the elimination of societal and economic disparities as a top priority.<sup>307</sup> The Act also targets institutional and cultural factors that foster and sustain discrimination.<sup>308</sup> According to PEPUDA, all treatment of women that undermines their worth is discriminatory, including traditional and customary forms of treatment.<sup>309</sup> Furthermore, it is asserted that South Africa has an international responsibility to combat discrimination and

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<sup>299</sup> Rebecka Koziomtzi *Women's Rights and the Issue of Rape in KwaZulu-Natal: A Minor Field Study on The Gap between International Human Rights Law and the Reality Faced by South African Women* (Thesis in International Law, Stockholm University, 2014).

<sup>300</sup> Ibid.

<sup>301</sup> Ibid.

<sup>302</sup> Ibid.

<sup>303</sup> Ibid.

<sup>304</sup> Ibid.

<sup>305</sup> The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA).

<sup>306</sup> Section 3 of PEPUDA.

<sup>307</sup> Preamble of PEPUDA at para 1.

<sup>308</sup> Preamble of PEPUDA at para 2.

<sup>309</sup> Section 8(d) of PEPUDA.

advance equality.<sup>310</sup> As a result, protection from unfair discrimination is safeguarded and recognised internationally, regionally, and domestically.

### *Non-racialism and non-sexism*

As mentioned in the previous chapter, the history of rape in South Africa is linked to a history of both sexism and racism, therefore, another important component of equality is non-racialism and non-sexism, which are part of the founding provisions of the Constitution. Nonracialism is not simply the absence of racism — that is meaningless.<sup>311</sup> According to Albie Sachs, non-racialism entails eradicating all apartheid obstacles in terms of access to government and freedom of movement for everyone to feel as though this is their country.<sup>312</sup> Non-racialism was an end for Biko, not a means to an end.<sup>313</sup> As mentioned by Biko, what we want is a non-racial society within the framework of the country and the people we are.<sup>314</sup> According to Biko, ‘Black Consciousness would be unnecessary in a society that was not exploitative and did not stratify based on race’.<sup>315</sup> Kevin Minofu explains that Biko’s perspective of race, and hence non-racialism, ‘was material in that race was not only a problem of classification by race but also of the distribution of material resources that resulted from that classification’.<sup>316</sup> Therefore, Biko viewed race as a question of law, economics, politics, and sociology.<sup>317</sup> According to Modiri:

[I]t is worth recalling the classic Black Consciousness dual formulation of liberation in terms of the ‘psychological’ and the ‘physical’. Freedom from psychological oppression entails ‘emancipation from mental slavery’ and from an inferiority complex. It extends also to epistemological and cultural liberation. On the other hand, ‘physical’ liberation from the material oppression suffered by Blacks in a racist society includes freedom from economic deprivation, social death, political disenfranchisement, and legally sanctioned discrimination. It is only once Blacks are liberated in this manner, that a truly non-racial post-colonial nation can come into being. That is to say that for Biko, liberation must entail both respect for plurality

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<sup>310</sup> Preamble of PEPUDA at para 4.

<sup>311</sup> Kevin Minofu ‘Non-Racial Constitutionalism: Transcendent Utopia or Colour-Blind Fiction?’ (2021) 11(1) *Constitutional Court Review* 301-322.

<sup>312</sup> *Ibid.*

<sup>313</sup> *Ibid.*

<sup>314</sup> *Ibid.*

<sup>315</sup> *Ibid.*

<sup>316</sup> *Ibid.*

<sup>317</sup> *Ibid.*

and difference as well as the restoration of material and symbolic parity between whites and Blacks such that those categories cease to be of any meaning or value.<sup>318</sup>

Anything less than that material commitment to upending racial order through colour-blindness would reinforce racism, or, as Biko put it, ‘white racism’.<sup>319</sup> As such, Biko’s idea of non-racialism was completely emancipatory of racial oppression’s lived realities, and he wrote against variations of the ideology that would have resorted to colour-blind compromises to the status quo.<sup>320</sup> Furthermore, dismantling race would necessitate addressing its legal, economic, political, and social expressions too.<sup>321</sup> The same ideology can be adopted when considering non-sexism, which is explicitly identified as a core value of the Constitution on par with non-racism.<sup>322</sup> In a democracy, this means that women, who were previously oppressed owing to their gender, have the right to the ‘full and equal enjoyment of all rights and freedoms’.<sup>323</sup> In keeping with Biko and Modiri’s reasoning, Manjoo recommends that we take a holistic approach to human rights, which necessitates acknowledging discriminating imbalances.<sup>324</sup> Therefore, intersectionality is important in overcoming historical discriminatory practices.<sup>325</sup> Intersectionality, as articulated by Crenshaw, in its most basic sense, refers to the many factors that contribute to an individual’s experience of prejudice.<sup>326</sup>

Gender, race, class, ability, religion, nationality, and sexual orientation are examples of these ‘overlapping’ social characteristics.<sup>327</sup> Therefore, using an intersectional framework can help us understand how systemic injustices and socioeconomic inequities manifest themselves on multiple levels.<sup>328</sup> Traditional ideas of oppression like ‘racism, sexism, and homophobia’ according to intersectionality, are ‘not self-contained’.<sup>329</sup> Rather, these interrelate and create an oppressive system that results in the ‘intersection’ of numerous forms of discrimination.<sup>330</sup> Intersectionality is significant because, in the mainstream perspective, a discriminator treats all

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<sup>318</sup> Joel Malesela Modiri *The Jurisprudence of Steve Biko: A Study in Race, Law, and Power in the ‘Afterlife’ of Colonial-Apartheid* (PhD Thesis, University of Pretoria, 2017) at 93.

<sup>319</sup> Minofu op cit note 320.

<sup>320</sup> Ibid.

<sup>321</sup> Ibid.

<sup>322</sup> Ibid.

<sup>323</sup> Ibid.

<sup>324</sup> Manjoo op cit note 274.

<sup>325</sup> Kornergray op cit note 260.

<sup>326</sup> Intersectionality refers to the interconnected nature of social categorisations such as race, gender, and class, especially as they apply to an individual or a group, creating overlapping and interdependent systems of discrimination or disadvantage.

Crenshaw op cit note 35.

<sup>327</sup> Ibid.

<sup>328</sup> Ibid.

<sup>329</sup> Ibid.

<sup>330</sup> Ibid.

people within a race/sex category in the same way.<sup>331</sup> In reality, Black women are erased and as a result, evaluating things along a single axis is problematic, because if the legislation truly claims to protect all women, it must consider their diversity. The Constitutional Court in *Tshabalala* stated that sexual violence is a scourge that affects women of all races, classes, and sexual orientations; however, sexual violence is especially harmful to Black women in South Africa.<sup>332</sup> To remove the racial component from this epidemic is to remove the women's experiences from that terrible experience.<sup>333</sup> This 'intersectional erasure' is a linguistic move that dismisses women's lived experiences at these intersections of oppressed identities and implies that our response to the problem will always be inadequate and under-inclusive.<sup>334</sup> Therefore, speaking of rape in these terms is not an obsession with personal identification but rather an examination of how power affects specific women.<sup>335</sup>

#### **(d) Human Dignity**

According to the court in *Tshabalala*:

Rape is a very serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity, and the person of the victim. The rights to dignity, to privacy, and the integrity of every person are basic to the ethos of the Constitution and to any defensible civilisation. Women in this country are entitled to the protection of these rights.<sup>336</sup>

As noted by Mathopo AJ rape is a severe and systemic violation of human rights, and another right breached by rape is the right to human dignity, protected by Section 10 of the South African Constitution.<sup>337</sup> Rape, according to the Inter-American Court, is intended to degrade women's dignity on cultural, social, familial, and individual levels.<sup>338</sup> Human dignity is the concept that every individual has fundamental value.<sup>339</sup> Respect for the dignity of all human beings is especially crucial in South Africa, where apartheid and colonialism denied a shared humanity for so long, consequently reducing the dignity of non-white South Africans.<sup>340</sup> The

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<sup>331</sup> Kornergray op cit note 260.

<sup>332</sup> *Tshabalala* supra note 34.

In September 1998, Tshabalala and Ntuli, along with a group of men, violently attacked homes in Tembisa, Gauteng. They forcefully entered, looted, and assaulted occupants, stabbing one person. Posing as police officers, they subjected eight females, including a 14-year-old and a visibly pregnant woman, to multiple rapes. Some men acted as lookouts during these crimes. The case, centred on common-law rape under the common-purpose doctrine, reached the Constitutional Court.

<sup>333</sup> Ibid.

<sup>334</sup> Ibid.

<sup>335</sup> Ibid.

<sup>336</sup> Ibid.

<sup>337</sup> Ibid.

<sup>338</sup> *Las Dos Erres Massacre v Guatemala* Judgment of 24 November 2009.

<sup>339</sup> We op cit note 297.

<sup>340</sup> Ibid.

recognition and protection of human dignity is the condition for democracy in South Africa and a fundamental principle of the Constitution.<sup>341</sup> Several international conventions acknowledge the value of a person's right to be treated with respect, even globally.<sup>342</sup>

Article 1 of the Universal Declaration of Human Rights (Universal Declaration) echoes the requirements of Section 10 in asserting that 'all people are born free and equal in dignity and rights'.<sup>343</sup> Therefore, no one should be subjected to torture or cruel, inhuman, or degrading treatment or punishment, according to Article 5 of the Universal Declaration.<sup>344</sup> This right is inextricably linked to human dignity and is critical to international human rights law's protection of women against rape.<sup>345</sup> Although the Universal Declaration of Human Rights is a declaration issued by the United Nations General Assembly and not a legally binding document in and of itself, it is now widely accepted as embodying customary international law.<sup>346</sup> The ICCPR, however, is a legally binding instrument that lays out the general principles of the Universal Declaration.<sup>347</sup> Under Article 7 of the ICCPR, torture and other forms of ill-treatment are prohibited.<sup>348</sup> The Human Rights Committee has recognised rape and other types of sexual violence as torture under Article 7.<sup>349</sup> Regionally, The African Charter on Human and People's Rights reinforces essential values of human dignity.<sup>350</sup>

According to the Constitutional Court in *Hugo*, determining whether there has been an impairment of the right to dignity and the level of such impairment is essential to the equality test.<sup>351</sup> The Constitutional Court has further ruled that discrimination is treating persons differently in a way that damages their inherent dignity as human beings.<sup>352</sup> According to the Constitutional Court, the right to human dignity cannot be waived or trumped by any other

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<sup>341</sup> 'Dignity is also the foundation of an individual's inherent rights to freedom and equality, life, and privacy. Instead of preserving the privileges of the powerful, the Constitution was drafted to safeguard and advance the rights and dignity of the most vulnerable members of our society. Dignity underpins the entire Bill of Rights and, among many other functions, provides protection against gender-based violence in the private sphere.'

See *We, the people* op cit note 288.

<sup>342</sup> *Ibid.*

<sup>343</sup> *Ibid.*

<sup>344</sup> Koziomtzi op cit note 299 at 17.

<sup>345</sup> *Ibid.*

<sup>346</sup> *Ibid.*

<sup>347</sup> *Ibid.*

<sup>348</sup> *Ibid.*

<sup>349</sup> *Ibid.*

<sup>350</sup> *Ibid.*

<sup>351</sup> *President of Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) para 41.

<sup>352</sup> *Prinsloo v Van der Linde & Another* 1997 (3) SA 1012 (CC) para 31.

right.<sup>353</sup> When looking at rape it is abundantly evident that the inherent dignity of the victim was violated as a result of the conduct of the offender and this is true for all forms of rape.<sup>354</sup>

**(e) Right to Life**

The Court in *Tshabalala* stated that many victims of rape, ‘do not experience rape as a sexual encounter but as a frightening, life-threatening attack and as a moment of immense powerlessness and degradation’.<sup>355</sup> Therefore, rape violates Black women’s right to life which is protected by Section 11 of the Constitution, which declares that everyone has the right to life.<sup>356</sup> However, this right is unqualified, whereas other states and international organisations have qualified the right to life by stating that it cannot be arbitrarily withheld.<sup>357</sup> According to former Justice O’Regan, the right to life comes before all other constitutional rights because none of the Bill of Rights can be exercised without life.<sup>358</sup> Furthermore, it was established that the right to life is intrinsically linked with the right to dignity, as life is significantly diminished in the absence of dignity.<sup>359</sup> In support of this, the Supreme Court of Appeal determined that court officers know how sexual abuse deprives women of their right to dignity and bodily integrity.<sup>360</sup> Furthermore, in *S v Chapman*, it was determined that rape generally comprises a humiliating, demeaning, and cruel invasion of the victim’s privacy and dignity.<sup>361</sup>

**(f) Freedom and Security of Persons including The Right to be Free from All Forms of Violence from Public and Private Sources.**

The right to freedom and the security of one’s person is guaranteed to all citizens by Section 12 of the Constitution.<sup>362</sup> According to Section 12 (1)(c), every person has the right to an environment free from physical, sexual, psychological, economic, and other abuse by state and private individuals.<sup>363</sup> When it comes to the protection of women from rape under international law, the International Covenant on Economic, Social, and Cultural Rights (ICESCR) may not be the primary source referred to, however, it does contain a significant provision in this

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<sup>353</sup> Mwambene and Wheal op cit note 298.

<sup>354</sup> Ibid.

<sup>355</sup> *Tshabalala* supra note 34 para 70.

<sup>356</sup> Section 11 of the Constitution of the Republic of South Africa of 1996.

<sup>357</sup> Other jurisdictions include the United States, Canada, Hungary and India and the international instruments are the European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols 11 and 14, 4 November 1950.

See Mwambene and Wheal op cit note 298.

<sup>358</sup> *S v Makwanyane* 1995 (3) SA 391 (CC) para 326.

<sup>359</sup> Ibid at para 327.

<sup>360</sup> *DPP v Prins* (Minister of Justice and Constitutional Development & two amici curiae intervening (369/12) [2012] 106 ZASCA para 1.

<sup>361</sup> *S v Chapman* 1997 (3) SA 341 (A).

<sup>362</sup> Section 12(1) of the Constitution of the Republic of South Africa 1996

<sup>363</sup> Section 12(1)(c) of the Constitution of the Republic of South Africa, 1996

situation.<sup>364</sup> Article 12(1) states that ‘the State Parties to the present Covenant recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health’.<sup>365</sup> There is little doubt that rape harms the victim’s physical and mental health, which is why this Article can be viewed as a complementary component within the human rights framework safeguarding women against rape.<sup>366</sup>

In *Carmichele* it was decided that the state owes its citizens a positive obligation to safeguard them through laws and institutions and that in cases where a citizen’s life or person is in danger due to the unlawful actions of a third party, the state must take precautionary steps.<sup>367</sup> Therefore, the perpetrators of rape violate the rights of their victims by violating their right to safety from physical harm and interference from others.<sup>368</sup> This provision also gives everyone the right to physical and mental integrity, including security and control over one’s body.<sup>369</sup> This implies that everyone has the right to make decisions regarding their bodies without interference from other members of society.<sup>370</sup> In a document commissioned by the Deputy Minister of Justice, it was noted that rape impacts all women’s sense of safety and bodily integrity by limiting their mobility and freedom of movement.<sup>371</sup>

The question arises as to whether Section 12(1)(c), which refers to the right to freedom rather than protection from violence, only creates a negative state duty to refrain from infringing on this right (i.e., to refrain from committing acts of violence against individuals) or whether it also imposes a positive duty where the state must prevent and punish acts of violence.<sup>372</sup> Instead, the state is placed under clear obligations to respect, promote, safeguard, and fulfil the right to freedom from violence, which includes protection against and punishment for rape, when reading Section 7(2) in connection with Section 12(1)(c).<sup>373</sup> The responsibility of states to victims of rape might be evaluated in light of international human rights legislation.<sup>374</sup> In addition to taking measures to prevent, investigate, and punish violations of the rights guaranteed by the Convention, states shall, where possible, work to restore the

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<sup>364</sup> Koziomtzi op cit note 299.

<sup>365</sup> Ibid.

<sup>366</sup> Ibid.

<sup>367</sup> *Carmichele v Minister of Safety and Security & Another* 2001 (4) SA 938 (CC) para 44-45.

<sup>368</sup> Mwambene and Wheal op cit note 298.

<sup>369</sup> Ibid.

<sup>370</sup> Ibid.

<sup>371</sup> Ibid.

<sup>372</sup> Pithey et al. ‘Legal aspects of rape in South Africa’ (1999) *Rape Crisis* 14.

<sup>373</sup> Ibid.

<sup>374</sup> Ibid.

infringed right and compensate victims for any resulting harm.<sup>375</sup> One interpretation of ‘freedom’ in the Constitution is the guarantee of a society in which people are unrestricted in their pursuit of happiness, the growth of their talents and abilities, the acceptance of their inherent humanity, and the questioning of conventional wisdom.<sup>376</sup> Human dignity relies on these freedoms being upheld.<sup>377</sup>

### **(g) Conclusion**

According to the Preamble of the Sexual Offence Act, rape is primarily a social problem that indicates a pervasive systemic failure, and the legal measures available to address it are restricted and reactive in nature, yet they are nonetheless important.<sup>378</sup> As Andrews pointed out, it would be naive and deceptive to believe that the ratification of treaties would end the battle for equality.<sup>379</sup> However, the ratification of the various treaties mentioned above would have significant symbolic and practical benefits.<sup>380</sup> They serve as an unambiguous message from the government that gender equality is a matter of national concern and a national commitment to enact laws and policies to realise the goals enshrined in international, regional, and domestic law.<sup>381</sup> However, the following statement, given by Susan Bazilli in 1990 before the creation of the post-apartheid interim constitution, remains the framework in which Black women’s entrenched inequality in South Africa should be viewed today:

When ‘rights’ intersect with ‘law’ the real issue is ‘power’. Who has the power to demand and who has the power to cede these rights? How do we attain our rights in the face of structural and systemic inequality? And in South Africa, the legacy of the legislated and instituted inequality of apartheid is legion. The history of ‘rights’ has developed from the liberal notion of equality under the law in an individual capacity, not from the structural inequalities of race, class, and gender. But the extension of ‘rights’ is associated with the foundations of democracy and freedom: the protection of the weak against the strong, the individual against the state... Where we must be vigilant is in recognizing that if gender and racial power relations stay unchanged, legal individual rights do not address problems, but rather translate them into those that are described as having a legal solution.<sup>382</sup>

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<sup>375</sup> Pithey et al. op cit note 372.

<sup>376</sup> Ibid.

<sup>377</sup> Ibid.

<sup>378</sup> Preamble of The Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

<sup>379</sup> Penelope Andrews ‘Spectators at the Revolution? Gender Equality and Customary Law in a Post-Apartheid South Africa’ (1994) 7 *Law & Anthropology: Internationales Jahrbuch Für Rechtsanthropologie*.

<sup>380</sup> Ibid.

<sup>381</sup> Ibid.

<sup>382</sup> Susan Bazilli *Putting Women on the Agenda* (1991) 13-14.

Therefore, the ongoing sexual violence epidemic in South Africa echoes our failure to give realisation to the rights of Black women and this will further be discussed in the next chapter

#### IV. THE UNRAPEABLE BLACK WOMAN IN CONTEMPORARY SOUTH AFRICA

Despite having one of the world's most progressive constitutions that guarantee basic human rights to all citizens, South Africa continues to apply the colonial model of whiteness and/or maleness to determine who is eligible for full citizenship and the enjoyment of these rights.<sup>383</sup> This is due to colonialism's structural, institutional, systemic, and affective effects reaching far and wide.<sup>384</sup> In essence, colonial authority is dispersed, and we are all victims of internalised colonialism and its ideology; its logic is firmly ingrained in our daily lives, including those responsible for its perpetuation.<sup>385</sup> This phenomenon is referred to as coloniality, and Nelson Maldonado-Torres defines it as follows:

Coloniality refers to long-standing patterns of power that emerged as a result of colonialism, but that define culture, labour, intersubjective relations, and knowledge production well beyond the strict limits of colonial administrations. Thus, coloniality survives colonialism. It is maintained alive in books, in the criteria for academic performance, in cultural patterns, in common sense, in the self-image of peoples, in aspirations of self, and so many other aspects of our modern experience. In a way, as modern subjects, we breathe coloniality all the time and every day.<sup>386</sup>

Gabriella Mazzon highlights the problematic nature of the term 'postcolonial,' often associated with a temporal sense of post- that seemingly suggests the end of colonialism's ideology influence.<sup>387</sup> However, as Colleen Mack-Canty puts it, the 'post' in postcolonialism does not imply that colonialism has ended but rather acknowledges the enduring presence of colonial legacies.<sup>388</sup> Ndlovu-Gatsheni agrees with this idea and believes that although Africans exist beyond the end of colonialism, their existence remains constrained by the limits of coloniality.<sup>389</sup> In light of this, I argue that as Black women, we continue to face colonial limitations and enduring stereotypes, with the hyper-sexualisation of our bodies persisting. The purpose of this chapter is to utilise the framework of coloniality to illustrate the continued stereotype of the 'unrapeable' Black woman within the South African criminal justice system.

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<sup>383</sup> Zethu Albanie *The Unrapeable* (Unpublished Masters Research Paper for Gender and Literature – Short Paper, University of Cape Town, 2021) at 3.

<sup>384</sup> Sylvia Tamale *Decolonization and Afro-feminism* (2020) 245.

<sup>385</sup> Ibid.

<sup>386</sup> Nelson Maldonado-Torres 'On the Coloniality of Being: Contributions to the Development of a Concept' (2007) 21(2-3) *Cultural Studies* 243.

<sup>387</sup> Gabriella Mazzon 'English and the Development of Postcolonial Literature' (2012) *The Cambridge History of Postcolonial Literature* 705.

<sup>388</sup> Colleen Mack-Canty 'Third-Wave Feminism and the Need to Reweave the Nature/Culture Duality' (2004) 16(3) *NWSA Journal* 164.

<sup>389</sup> Sabelo Ndlovu-Gatsheni 'Decoloniality as the Future of Africa' (2015) 13(10) *History Compass* 485–496.

It delves into the examination of how colonial and apartheid legacies manifest through sexual violence and the persistent hyper-sexualisation of the Black female body. Using the framework of coloniality, this chapter analyses the role of various legal/justice system actors in perpetuating the notion that Black women are unrapeable and draws parallels with historic social responses.

### **(a) Rape in Contemporary South Africa**

As noted by *Tshabalala*:

Hardly a day passes without any incident of gender-based violence being reported. This scourge has reached alarming proportions. It is sad and a bad reflection of our society that 25 years into our constitutional democracy, underpinned by a Bill of Rights which places a premium on the right to equality and the right to human dignity, we are still grappling with what is a scourge in our nation.<sup>390</sup>

Snodgrass argues that ‘rape is an act of sexual savagery, it is a weapon of war—in this case, the ‘war’ on South African women’.<sup>391</sup> When I was first raped, I had a hard time processing what had happened to me. I do not remember much about that night, but what I do remember is that I was already trying to give a name to the trauma it caused me, while it was still unfolding.<sup>392</sup> Was it a threat, an attack, or my fault? Nthabiseng Motsemme contends that ‘narratives of extreme human rights violation leave many individuals unable to articulate their felt pain, loss and suffering’.<sup>393</sup> How does one even begin to describe the feeling of having your body, dignity, and sense of self violated in the worst way possible?<sup>394</sup> To what extent, without watering it down, are rape victims able to distil their experience into a string of words?<sup>395</sup> Hall states that:

‘Rape’ is precisely what the victim does *not* experience, but she has no other name with which to describe the event. The victim is forced to use the language of the dominant group (with its encoded male bias) to interpret and make sense of the event. Without a language, she has no power to name the event for herself, and her experience and perception of it cannot be verified. On the contrary, they are invalidated by the dominant reality.<sup>396</sup>

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<sup>390</sup> *Tshabalala* supra note 34.

<sup>391</sup> Snodgrass op cit note 23.

<sup>392</sup> Albanie op cit note 3.

<sup>393</sup> Nthabiseng Motsemme ‘The Mute Always Speak: On Women’s Silences at the Truth and Reconciliation Commission’ (2004) 52(5) *Current Sociology* 915.

<sup>394</sup> Albanie op cit note 3.

<sup>395</sup> *Ibid.*

<sup>396</sup> C Hall ‘Rape: The Politics of Definition’ (1988) 105 *SALJ* 72-3.

Unfortunately, the inadequacy of language precludes many complainants from adequately articulating the experience of systemic degradation and humiliation, thus rendering complainants impotent.<sup>397</sup>

Despite not having the language to articulate what had happened, I recall feeling immobilised and wondering if anyone would believe me. During that time, I grappled with the daunting of proving that it was not my fault, that I did not ask for it, and that I was, in fact, the victim in this case. When it comes to the rape criminal process, credibility becomes paramount, exemplified by the ‘he said/she said’ contest.<sup>398</sup> Questions of credibility have always been related to rape allegations.<sup>399</sup> A classic ‘he said/she said’ scenario involves an accuser and an accused person, both of whom claim to have the facts about what happened.<sup>400</sup> Siphokazi Jonas sheds light on the interrogations faced by complainants who allege rape, forcing them to prove their innocence:

Did you say NO? Do your clothes say NO? Your values, your virtues, your life? How long have you lived as a NO? We put it to the court, that when you said NO (or couldn’t say it at all), you really meant YES! We submit, your Honour, that what matters is not what she says, it is what he believes he heard.<sup>401</sup>

The motivation for this dissertation stemmed from the reality that my credibility as a Black rape complainant was under scrutiny before I even arrived at the police station. Throughout this horrifying experience, I grappled with the question of whether I fit into the mould of the ‘perfect rape victim’. I was aware that privilege and respectability influenced who felt empowered to speak up, who was protected, and who was believed. However, this realisation was not an isolated lesson, but a collective experience shared amongst many other Black rape complainants. For many of us, the pursuit of justice did not rest within the confines of the criminal justice system.

I remember the distressing case of Cheryl Zondi, a Black rape complainant who accused televangelist Timothy Omotoso of rape and received threatening phone calls saying, ‘God will

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<sup>397</sup> Motsemme op cit note 393 at 915.

<sup>398</sup> Deborah Tuerkheimer ‘Incredible Women: Sexual violence and the Credibility Discount’ (2017) 166 *University of Pennsylvania Law Review*.

<sup>399</sup> Ibid.

<sup>400</sup> Ibid.

<sup>401</sup> Siphokazi Jonas ‘#DontLookAway: A poem - Thanks for the hashtag, but...’, available at <https://www.iol.co.za/capeargus/news/dontlookaway-a-poem-thanks-for-the-hashtag-but-18309899>, accessed 18 April 2023.

kill her because she goes against a man of God'.<sup>402</sup> Understanding the culture of impunity within the criminal justice system, the people she trusted persuaded her to conceal the rape since the accused was unlikely to go to prison.<sup>403</sup> During Omotoso's trial, the defence subjected Zondi to questioning about how deeply she believed the pastor penetrated her and why she did not scream.<sup>404</sup> Similar lines of cross-examination were posed to 'Khwezi', Fezekile Kuzwayo, during the Zuma Trial, where former President Jacob Zuma was acquitted of rape charges.<sup>405</sup> The defence scrutinised six previous rape cases reported by Khwezi and insinuated a higher likelihood of her making false accusations than being a rape victim.<sup>406</sup> The defence also emphasised her unmarried status, absence of biological children, and a past abortion.<sup>407</sup> According to Bennett, the determination and construction of Khwezi's character as a 'loose woman, evil bitch and disgrace' inescapably relies on rape myths acceptance and rape scripts.<sup>408</sup> Both these cases demonstrate how in contrast to the damsel in distress, colonialism has robbed us as Black women of our innocence, especially when it comes to rape.<sup>409</sup>

As previously mentioned, colonial views about Black sexual 'savagery' which were wrapped in the idea of Black people's bodies as objects to which anything may be done, shaped both the notions of 'the Black man as a rapist and the Black woman as unrapeable'.<sup>410</sup> According to Hamad, this is because Black women are easier to discredit.<sup>411</sup> Therefore, as Black women, we cannot politicise our sorrow in the same way that white women do this both reflects and reinforces our thing-ification and abjection from the sphere of the human.<sup>412</sup> It is not only that white women's tears are treasured while Black women's are discarded but it is because race and class are determined by the perceived ability to cry, that the exhibition of bourgeois white emotion dehumanises Black people.<sup>413</sup> As Kyla Schuller demonstrates, in nineteenth-century sex and race 'science', beliefs about sex difference (considered as a feature

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<sup>402</sup> Jo-Ann Floris and Philani Nombembe 'God will kill you, Cheryl Zondi told' *Sunday Times* 21 October 2019, available at <https://www.timeslive.co.za/sunday-times/news/2018-10-21-god-will-kill-you-cheryl-zondi-told/>, accessed 18 April 2023.

<sup>403</sup> Ibid.

<sup>404</sup> Ibid.

<sup>405</sup> Mathivha op cit note 74.

<sup>406</sup> Ibid at 52.

<sup>407</sup> Ibid.

<sup>408</sup> Jane Bennett *Challenges were Many: The One in Nine Campaign, South Africa* (2008) Association For Women's Rights In Development.

<sup>409</sup> Alison Phipps 'White Tears, White Rage: Victimhood and (as) Violence in Mainstream Feminism' (2021) 24(1) *European Journal of Cultural Studies* 86.

<sup>410</sup> Davis op cit note 119.

<sup>411</sup> Ruby Hamad 'White Tears/Brown Scars' (2019) *Melbourne University Press* 55.

<sup>412</sup> Phipps op cit note 409.

<sup>413</sup> Ibid

of bourgeois whiteness) coexisted with concepts about feeling.<sup>414</sup> This splits the ‘civilised’ body into two: the emotive female and the less sensitive and more rational male.<sup>415</sup> Consequently, the ability of the bourgeois white woman to cry, as well as her male counterpart’s ability to respond to her tears with action, was critical to her dominant standing.<sup>416</sup> Thus, humanness became associated with both the presumed capacity to feel and the ability to regulate those emotions.<sup>417</sup> As a result, victimhood and the need for protection were aligned with the image of the ‘refined, sensitive and civilised white woman’ rather than the Black woman.<sup>418</sup> Therefore, the shackles of colonialism, slavery, and apartheid still weighed heavily on our shoulders as Black women.<sup>419</sup> The following section will demonstrate how this notion, which displaces Black women as rape victims, continues to permeate the criminal justice system today.

### **(b) The Criminal Justice Response to Rape**

The Court in *Molaza v S* noted that:

Victims of rape, as a class of vulnerable people in our society, ought to have a reasonable expectation that their cases are taken seriously enough to be investigated properly and tried at a standard that the guilty do not wriggle free because of an uninsightful and superficial attention to details by those who are responsible to protect them.<sup>420</sup>

The Integrated Victim Empowerment Programme (IVEP), whose guiding concepts include victim empowerment via involvement and self-determination, serves as a model for a victim-centred approach.<sup>421</sup> It emphasises that victims must be treated with dignity, especially by care providers, who must be held accountable for providing efficient and effective services.<sup>422</sup> The National Policy Guideline for Victims of Sexual Offences, outlining best practices for the treatment of victims and witnesses within the criminal justice system, further encouraged this approach.<sup>423</sup> The preamble of the Sexual Offences Act commits to offering complainants of

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<sup>414</sup> Kyla Schuller *The Biopolitics of Feeling: Race, Sex, and Science in the Nineteenth Century* (2018).

<sup>415</sup> *Ibid* at 16.

<sup>416</sup> Phipps op cit note 409 at 87.

<sup>417</sup> *Ibid*.

<sup>418</sup> *Ibid*.

<sup>419</sup> Albanie op cit note 383.

<sup>420</sup> *Molaza v S* (A235/2018) [2020] ZAGPJHC 169; [2020] 4 All SA 167 (GJ) (31 July 2020) para 81.

<sup>421</sup> The IVEP is the partnership between various government departments and civil society on service delivery to victims of crime. It is aimed at creating a victim-friendly criminal justice system and reducing the negative impact of victimisation.

See Karin Chinnian and Aamina Petersen ‘Gender Construction in Sexual Offences Cases: A Case for Fully Reviving the Sexual Offences Courts’(2020) 1 *Acta Juridica* 135-163.

<sup>422</sup> *Ibid*.

<sup>423</sup> *Ibid*.

sexual offences the utmost and least traumatising protection the law can offer.<sup>424</sup> This commitment is based on the understanding that rape complainants must be listened to, heard, and spoken for by the justice system.<sup>425</sup> It recognises that these individuals are more than just the successful prosecution of a legal claim; they require validation of their experience of enduring sexual abuse.<sup>426</sup> However, this ideal is not consistently realised, and numerous cases fail to progress through the justice system. According to Machisa et al., rape case attrition is caused by the interaction of several variables relating to ‘the victims’ characteristics and their accounts of alleged perpetrators and circumstances of the rape incident,’ which are evaluated by actors such as the police, prosecutors, and judges at different stages of the criminal justice process.<sup>427</sup> While evidentiary evaluations are expected to adhere to predetermined norms for investigation, prosecution, and judicial norms.<sup>428</sup> Nevertheless, individual criminal justice actors’ perspectives and motivations, can significantly influence the success or failure of a case and will be discussed in the following section.<sup>429</sup>

### **(c) The South African Police Service**

Law enforcement officers play a crucial role in prosecuting rape offenders and ensuring justice for rape victims.<sup>430</sup> Typically, police officers are the first point of contact for victims seeking assistance after a rape.<sup>431</sup> Beyond being the initial responders, police officers are often referred to as the ‘gateways of justice’ due to their substantial authority in determining which cases are deemed suitable for referral for prosecution.<sup>432</sup> In South Africa, the South African Police Service (SAPS) holds the responsibility for preventing and investigating crimes, as mandated by Section 205(3) of the Constitution.<sup>433</sup> The SAPS’ Code of Conduct is a commitment to establish a safe and secure environment for all South Africans by investigating criminal activity that jeopardises the safety or security of the community and by bringing those responsible to

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<sup>424</sup> Chinnian and Petersen op cit note 421.

<sup>425</sup> Stacy Moreland ‘Talking about Rape-and Why it Matters: Adjudicating Rape in the Western Cape High Court’ (2014) 47 *SA Crime Quarterly*.

<sup>426</sup> Ibid.

<sup>427</sup> Mercilene Machisa et al. ‘Factors Associated With Rape Case Attrition in the South African Criminal Justice System: A National Cross-Sectional Study’ (2022) *The British Journal of Criminology*.

<sup>428</sup> Ibid

<sup>429</sup> Ibid

<sup>430</sup> Rachele Daffara *The Pervasiveness of Rape Myths Acceptance and the Transformative Potential of the Istanbul Convention: GREVIO’s Contribution* (Master’s Thesis, University of Cyprus, 2018) 29.

<sup>431</sup> Ibid.

<sup>432</sup> Ibid.

<sup>433</sup> Section 205(3) of the Constitution of the Republic of South Africa 1996.

justice.<sup>434</sup> In addition, the National Instruction on Sexual Offences gives the following directive:

Any person who reports the alleged commission of a sexual offence to a member must be treated in a professional manner and must be reassured that the report is viewed in a serious light and will be thoroughly investigated.<sup>435</sup>

The directive was issued to guarantee that the SAPS provides victims with professional services during the investigation of sexual offences and provides the necessary support.<sup>436</sup> It aims to raise awareness among SAPS members about the secondary trauma endured by victims of sexual offences and promotes sensitivity during interviews and when assisting victims.<sup>437</sup> It also states that informing the victim regularly of the progress of the investigation is imperative.<sup>438</sup> The investigation officer's role is also defined in the Instruction.<sup>439</sup>

### *SAPS and Rape Complainants*

The 1995 Human Rights Watch report noted that contrary to the principles of the South African democratic dispensation, police frequently cling to stereotypes regarding raped women.<sup>440</sup> In addition, when complainants do come forward, the police may not always approach the matter with the required understanding and sensitivity.<sup>441</sup> Studies indicate that, throughout the investigation, police officers cast doubt on the credibility of the alleged victim.<sup>442</sup> Factors such as delayed reporting and contradictory allegations may complicate the case, with many police officers regarding these as a 'problematic case' or as unfounded and false.<sup>443</sup> According to Lewis, in South Africa, police officers commonly fail to recognise rape as a crime, aligning with society's normalisation rape, ultimately leading to the decriminalisation of rape by the police.<sup>444</sup>

In a study conducted by Sebaeng et al., this decriminalisation was evidenced by a participant's account, which recounted an incident involving two male and one female police

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<sup>434</sup> South African Police Service (SAPS) Code of Conduct, available at <https://www.saps.gov.za/about/conduct.php>, accessed 20 April 2023.

<sup>435</sup> Section 6 of the National Instruction 3/2008 Sexual Offences.

<sup>436</sup> Section 5 of the National Instruction 3/2008 Sexual Offences.

<sup>437</sup> Section 5(1) of the National Instruction 3/2008 Sexual Offences.

<sup>438</sup> Section 5 of the National Instruction 3/2008 Sexual Offences.

<sup>439</sup> Section 9 of the National Instruction 3/2008 Sexual Offences.

<sup>440</sup> Human Rights Watch 'South Africa: The State Response to Domestic Violence and Rape' November 1995 available at <https://www.hrw.org/legacy/reports/1995/Safricawm-02.htm>, accessed 20 April 2023.

<sup>441</sup> Smythe op cit note 57 at 166.

<sup>442</sup> Ibid.

<sup>443</sup> Ibid at 88.

<sup>444</sup> Sharon Lewis *A Cry that No One Hears* (1997) Centre for the Study of Violence and Reconciliation.

officer.<sup>445</sup> In this account, the victim attempted to report a rape to law enforcement.<sup>446</sup> The policewoman in response to the victim expressed disinterest and stated: ‘she was not interested niks [not at all] in the case. It was issues of ‘hey man, let us ... we will see that person; hey, we are wasting time. Heh! This ..., this, and that.’<sup>447</sup> In this scenario, both the policeman and policewoman displayed contempt toward the victim and made it clear that it is unlikely that they will capture and prosecute the rapist.<sup>448</sup> As a result, the victim found herself questioning why the policewomen, being a fellow woman, did not listen more attentively and empathetically in this situation, but she was the one who suggested they leave.<sup>449</sup> Unfortunately, this represents a recurring pattern, a discouraging factor many rape victims consider when deciding whether to disclose their assault.<sup>450</sup>

The Constitutional Court, as emphasised in *Levenstein*, highlights that even when victims are cognisant of their abuse, they instinctively consider the potential absence of support from the police.<sup>451</sup> The court in *AK* stated that failure of the SAPS to respond with empathy and compassion or engaging in victim-blaming behaviour leads to secondary victimisation.<sup>452</sup> This, in turn, contributes to the low success rate of rape and other sexual offence cases in court.<sup>453</sup> The following insights from a study conducted by Steyn and Steyn further explain this phenomenon:

However, [rape victims] also indicated that they would not have reported their rape incidents to the police if they knew they would be treated by the police in the way they were. All of the rape victims that were interviewed described the police officers’ behaviour as apathetic, uncaring, intimidating, and suspicious. Furthermore, none of the rape victims at the time of being interviewed had received any feedback from the police with regard to the investigative progress of their cases. It can also be argued that these rape victims would not advise other rape victims to report their rape incidents to the police due to their own negatively perceived experiences of police treatment.<sup>454</sup>

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<sup>445</sup> Jeanette M Sebaeng et al. ‘Experiences of Women who Reported Sexual Assault at a Provincial Hospital, South Africa’ (2016) 39(1) *Curationis* 5.

<sup>446</sup> *Ibid.*

<sup>447</sup> *Ibid.*

<sup>448</sup> *Ibid.*

<sup>449</sup> *Ibid.*

<sup>450</sup> *Ibid.*

<sup>451</sup> *Levenstein and Others v Estate of the Late Sidney Lewis Frankel and Others* (CCT170/17) [2018] ZACC 16 para 57.

<sup>452</sup> *AK v Minister of Police* [2022] ZACC 14 para 64.

<sup>453</sup> *Ibid.*

<sup>454</sup> E Steyn and J Steyn ‘Revictimisation of Rape Victims by the South African Police Service’ (2008) 1 *Acta Criminologica* 41 at 56.

In essence, this suggests that when the SAPS fails to operate following a victim-centred strategy, this infringes on the victims' rights to equality, dignity, and freedom from violence, conflicting with their guiding policies and legislation.<sup>455</sup> Moreover, it contradicts the constitutional and international duties of the state to eradicate gender-based violence and impedes access to justice.<sup>456</sup>

### *SAPS and Black Rape Complainants*

Racial dynamics persist as a significant factor in the perceptions of crime and violence in South Africa.<sup>457</sup> In a study by Dosekun, a white female participant who had not experienced sexual assault expressed the belief that rape was strongly linked to poverty and so centred in largely Black or Coloured township communities.<sup>458</sup> Conversely, a Black female participant in the same study, asserted that white women fear Black men, influenced by media portrayals of Black men as perpetrators in line with the Apartheid concept of *swaart gevaar*.<sup>459</sup> However, she acknowledged the difficulty of predicting the perpetrator's race due to the taboo nature of rape and its occurrence in private settings.<sup>460</sup> This perception of a Black man as the perpetrator is reinforced by the legal system's imposition of lengthier sentences on Black men for rape compared to their white counterparts, further exacerbating preconceptions and prejudices.<sup>461</sup> Furthermore, if a woman, regardless of race, experiences sexual assault by a white middle-class male, they may hesitate to disclose the crime due to the fear of not being believed.<sup>462</sup> These views are problematic not only for promoting racial stereotypes but also for creating barriers to victims disclosing their experiences of rape.<sup>463</sup> As Moffett contends, the politically unsettling reality is that gender equality in a democratic South Africa has not been accomplished.<sup>464</sup> The historical context of racial servitude has positioned Black women as having little dignity to lose and hence unrapeable.<sup>465</sup> The denial or minimisation of harm done to Black people, particularly Black women, is rooted in historical racial institutions and

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<sup>455</sup> *AK supra note 452 para 65.*

<sup>456</sup> *Ibid.*

<sup>457</sup> *Lechesa op cit note at 2.*

<sup>458</sup> Simidele Dosekun "Rape is a Huge Issue in this Country": Discursive Constructions of the Rape Crisis in South Africa' (2013) 23(4) *Feminism & Psychology* 517-535.

<sup>459</sup> *Ibid.*

<sup>460</sup> *Ibid.*

<sup>461</sup> *Lechesa op cit note 2 at 30.*

<sup>462</sup> *Ibid.*

<sup>463</sup> *Ibid.*

<sup>464</sup> Helen Moffett 'Sexual Violence, Civil Society and the New Constitution' (2008) *Women's Activism in South Africa: Working Across Divides* 155-184.

<sup>465</sup> *Helman op cit note 26.*

continues to impact contemporary perceptions and reactions to their experiences of sexual violence.<sup>466</sup>

#### **(d) The National Prosecuting Authority of South Africa**

The National Prosecuting Authority of South Africa (NPA) is directed by the Constitution, to secure justice for crime victims by prosecuting without ‘fear, favour, or prejudice’ and by collaborating with partners and the public to solve and prevent crime.<sup>467</sup> The NPA is mandated by Section 179 of the Constitution<sup>468</sup> and the National Prosecuting Authority Act 32 of 1998.<sup>469</sup> The NPA has the jurisdiction to begin and conduct criminal proceedings on behalf of the state, as well as undertake any necessary responsibilities ancillary to initiating and conducting criminal procedures, and terminating criminal proceedings.<sup>470</sup> They are required to represent the state and community interests in criminal proceedings.<sup>471</sup> The NPA has also adopted the Service Charter for Victims of Crime in South Africa (Victims’ Charter) to ensure that victims have the right to fairness, privacy, dignity, the ability to offer and receive information, as well as the right to protection, help, compensation, and restitution.<sup>472</sup> Furthermore, the NPA established the Sexual Offences and Community Affairs Unit (SOCA Unit) in 1999 to enhance the government’s capacity to combat sexual assault against women and children.<sup>473</sup> However, prosecutor activities contribute to attrition, both during the initial referral for the decision to prosecute and later, with the withdrawal of half of the enrolled cases before the trial commencement.<sup>474</sup>

Numerous studies highlight the alarming phenomenon of rape case attrition within the criminal justice system: due to prosecutorial decision-making, the majority of rape cases do not progress, leading to a lack of convictions for rapists.<sup>475</sup> According to Daffara, nearly half of the forwarded to prosecutors by the police are not prosecuted.<sup>476</sup> Prosecutors show a greater

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<sup>466</sup> Helman op cit note 26.

<sup>467</sup> Preamble of the National Prosecuting Authority Act No. 32 of 1998.

<sup>468</sup> Section 179(2) of the Constitution expressly empowers the prosecuting authority to institute criminal proceedings on behalf of the state.

<sup>469</sup> The National Prosecuting Authority Act ratifies Section 179 of the Constitution which endorses the NPA as the country’s sole prosecuting authority.

<sup>470</sup> National Prosecuting Authority of South Africa (NPA) - Overview. (2022), available at <https://nationalgovernment.co.za/units/view/66/national-prosecuting-authority-of-south-africa-mpa>, accessed on 21 November 2022.

<sup>471</sup> Ibid.

<sup>472</sup> The Service Charter for Victims of Crime in South Africa.

<sup>473</sup> Ibid.

<sup>474</sup> Mercilene Machisa et al. ‘Attrition of Rape Matters At The Prosecution Stage of The South African Criminal Justice System’ (2018) *South African Medical Research Council* .

<sup>475</sup> Daffara op cit note 430 at 30.

<sup>476</sup> Ibid.

willingness to pursue cases involving identified strangers, physical violence, and firearms use while being less likely to proceed with cases involving drunk victims.<sup>477</sup> These patterns are consistent with prejudices about what constitutes ‘real rape’ and appear to influence the prosecutor’s decision to enrol cases.<sup>478</sup> Prosecutors typically establish criteria for ‘normal behaviour’ and a ‘natural reaction’ to rape, both outside and within the courtroom.<sup>479</sup> If an alleged victim fails to behave or react as the ‘ideal victim of rape’ would have, their status as a victim will likely be questioned and discredited.<sup>480</sup>

### *NPA and Black Rape Complainants*

Mogale and Richter’s research revealed that complainants are categorised by race, ethnicity, age, social class, physical ability, and location.<sup>481</sup> A participant in the study stated:

When I started working as a prosecutor, I mean a prosecutor in Regional Court; I [was made] to understand that a Black woman will never be raped--let me not say never, [According to the court] --it was only a coincidence to find that a Black woman was raped, and the court acknowledges that. Usually, if you are in court [as a prosecutor] and you are leading evidence, and the woman says [that] I went to a shebeen. [There and there] the magistrate will put the pen down [acting the process of putting the pen down] [which will imply that] he is already discharging the case [silence.] Even if you can meet any kind of evidence, the magistrate will cancel the case before you even start to try the woman [because the woman went to a shebeen]. Mind you in a shebeen in the townships they also sell soft drinks. If the woman can say, I went to the shop when I arrived in that shop there were some people who were drinking liquor [again acting out, putting the pen down], the magistrate will discharge the case So, the tactic, was that a Black woman is a liar as far as sexual violence is concerned.<sup>482</sup>

This account demonstrates the perception that as Black women we are liars, who go to shebeens in search of men and then falsely claim rape.<sup>483</sup> These stereotypes are organised as a collage of hierarchies that are matched with the highly regimented prosecution techniques that afford minimal opportunity for examination.<sup>484</sup> The sexualised female body of Black women carries

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<sup>477</sup> Daffarra op cit note 430 at 32.

<sup>478</sup> Ibid.

<sup>479</sup> Ibid.

<sup>480</sup> Ibid.

<sup>481</sup> Ramadimetja S. Mogale and Solina Richter ‘Prosecuting Violence against Women in South African Courts: A Reflection of the Legal Culture from an Afrocentric Perspective’ (2019) 20(7) *Journal of International Women's Studies* 90-101.

<sup>482</sup> Ibid at 95.

<sup>483</sup> Ibid.

<sup>484</sup> Ibid.

specific connotations of dishonesty, treachery, and unreliability.<sup>485</sup> Notably, in rape trials, the focus is placed on scrutinising the complainant rather than the accused, reflecting a prevalent distrust and contempt for the perceived morally corrupt female complainant within the criminal justice system.<sup>486</sup>

Assumptions about the honesty of women are also impacted by our race and social position.<sup>487</sup> Throughout history, Black women have faced heightened scepticism compared to white women when reporting rape, due to police perceptions of our untrustworthiness and racialised prejudices about our supposed promiscuity.<sup>488</sup> This pattern is not unique, as seen in British colonial India, where Indian women were similarly viewed to be dishonest and prone to making false rape claims.<sup>489</sup> The same prejudiced attitudes persisted in South Africa, where colonial attitudes generated a perception of hypersexuality among Black individuals.<sup>490</sup> Consequently, these colonial conceptions of Black women persist within the legal system, contradicting constitutional values that assert equality before the law. Nonetheless, a woman's credibility is still dependent on external factors, such as race. The racial discrimination experienced by Black rape complainants is deemed unlawful under both international and domestic law. Regrettably, the state has failed in its legal obligation to protect women from violence by neglecting to prosecute crimes of violence against women following domestic law.

#### **(e) The Judiciary**

In South Africa, the judiciary is synonymous with the court system, encompassing the institutions themselves, the individuals such as judges, magistrates, and other officers in charge of the daily operation, and the norms governing the courts.<sup>491</sup> In South Africa, according to Section 165(1) of the constitution, all judicial authority is vested in these institutions.<sup>492</sup> To give substance to the idea of separation of powers, all organs of state must support and maintain the independence, impartiality, dignity, accessibility, and efficacy of all other organs.<sup>493</sup> Judicial independence emphasises that the judiciary, responsible for interpreting and applying the law, should operate independently of other state organs.<sup>494</sup> Although the Constitution

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<sup>485</sup> FRIAR op cit note 17.

<sup>486</sup> Ibid.

<sup>487</sup> Hazan and Bridger op cit note 237.

<sup>488</sup> Ibid.

<sup>489</sup> Ibid.

<sup>490</sup> Ibid.

<sup>491</sup> Scott Robert 'The Judiciary' (2020) *Constitutional Law for Students* 139.

<sup>492</sup> Section 165(1) of the Constitution of the Republic of South Africa.

<sup>493</sup> Section 165(3) of the Constitution of the Republic of South Africa.

<sup>494</sup> Scott op cit note 491 at 139.

establishes an independent judiciary subject only to the Constitution and the law, which it is required to apply impartially and without ‘fear, favour, or prejudice’, this ideal is not always realised in practice.<sup>495</sup>

### *Judicial stereotyping*

Judicial stereotyping poses a regular and harmful impediment to justice, especially for rape complainants.<sup>496</sup> Such stereotyping leads judges to make case decisions based on preconceived notions rather than relevant evidence and thorough investigation.<sup>497</sup> This can have serious repercussions, including the distortion of judges’ perceptions of the facts, a skewed understanding of victimhood, and a biased assessment of the witness's credibility.<sup>498</sup> Ultimately, it jeopardises the impartiality and integrity of the justice system, potentially resulting in miscarriages of justice and the re-victimisation of complainants.<sup>499</sup> Rape complainants should be able to rely on a justice system devoid of myths and stereotypes, with a judiciary untainted by biased assumptions.<sup>500</sup> The United Nations High Commissioner for Human Rights, Navi Pillay, advocates for the elimination of stereotyping from the justice system, emphasizing its importance as a top priority.<sup>501</sup> Pillay states that:

States should ... take measures to eliminate wrongful gender stereotyping in all aspects of the criminal justice system.... Explicit action is required to ensure that government officials, especially those working in the justice system, do not deliver decisions based on harmful stereotypes and undermine the human rights of women and girls.<sup>502</sup>

Rape law, according to Naffine, is more than just a piece of legislation, a collection of words in an Act that may be read on their own.<sup>503</sup> Therefore, the judicial interpretation of laws plays a pivotal role, as traditional conceptions regarding the possessive and coercive nature of sexism and racism can be and have been incorporated into the law through judicial interpretation.<sup>504</sup>

### *Judicial Stereotyping of Black rape complainants*

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<sup>495</sup> Section 165(2) of the Constitution of the Republic of South Africa.

<sup>496</sup> Simone Cusack ‘Eliminating Judicial Stereotyping: *Equal Access to Justice for Women in Gender-based Violence Cases*’ (2014) *Office of the High Commissioner for Human Rights* 2.

<sup>497</sup> *Ibid.*

<sup>498</sup> *Ibid.*

<sup>499</sup> *Ibid.*

<sup>500</sup> *Ibid.*

<sup>501</sup> *Ibid* at 3.

<sup>502</sup> *Ibid.*

<sup>503</sup> Ngaire Naffine ‘Possession: Erotic Love in the Law of Rape’ (1994) 57 *Modern Law Review* 35.

<sup>504</sup> *Ibid.*

According to retired Judge Mabel Jansen, rape is ingrained in Black culture.<sup>505</sup> She continued by stating that Black men believe they are entitled to women's bodies, viewing women solely as objects.<sup>506</sup> Jansen claims that:

In their [Black South Africans] culture a woman is there to pleasure them. Period. It is seen as an absolute right and a woman's consent is not required. I still have to meet a black girl who was not been raped at about 12. I am dead serious.<sup>507</sup>

Jansen goes on to express the disturbing perspective that within the Black community 'the gang-rape of babies, girls, and women was seen as a 'pleasurable' pastime'.<sup>508</sup> Although Jansen's comments were spoken outside of the courtroom, they highlight the profound contamination of racism and rape culture within our society.<sup>509</sup> The pervasive nature of rape culture, accompanied by supporting myths, deeply infiltrates both private and public spheres, including the criminal justice system.<sup>510</sup> Consequently, sexual violence against Black women is, in effect, decriminalised.<sup>511</sup> The negative stereotypes surrounding Black women go beyond mere displacement; we are inscribed into the very concept of deviance.<sup>512</sup> In this way, specific social conceptions become racialised, such that deviant behaviour and risky sexual activity are perceived as endemic to the Black community.<sup>513</sup> This is consistent with the colonial conception of Black people that views us as morally bankrupt, promiscuous and in need of civilisation.

### *Sentencing*

According to Spies, the criminal justice system stands as the ultimate gendered institution, frequently perpetuating extremely sexist stereotypes about women.<sup>514</sup> Rape sentencing under current minimum-sentencing legislation<sup>515</sup> has done little to modify this attitude, as judicial

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<sup>505</sup> BBC News 'South African Judge Mabel Jansen in race rape row' 9 May 2016, available at <https://www.bbc.com/news/world-africa-36246081>, accessed 21 April 2023.

<sup>506</sup> Ibid.

<sup>507</sup> Ibid.

<sup>508</sup> Ibid.

<sup>509</sup> Helen Moffett 'Don't be surprised by Mabel Jansen – rape myths pervade South Africa courts' Mail & Guardian 20 May 2016, available at <https://mg.co.za/article/2016-05-20-dont-be-surprised-by-mabel-jansen/>, accessed 21 April 2023.

<sup>510</sup> Ibid.

<sup>511</sup> Ibid.

<sup>512</sup> Ibid.

<sup>513</sup> Ibid.

<sup>514</sup> Amanda Spies 'Perpetuating Harm: The Sentencing of Rape Offenders under South African Law' (2016) 133(2) *South African Law Journal* 389.

<sup>515</sup> Sections 51 and 52 of the Criminal Law Amendment Act.

officials use widely held rape myths and stereotypes in their sentencing practice.<sup>516</sup> South African judicial officials have traditionally had complete discretion when sentencing offenders, which was confirmed in *S v Dodo*, which found that judicial discretion is maintained because a judge can depart from a prescribed sentence if they believe it is inappropriate in the circumstances.<sup>517</sup> This is known as the provision for the evaluation of substantial and compelling circumstances, resulting in a variety of sentences being imposed, particularly in rape prosecutions.<sup>518</sup> The minimum-sentencing legislation for rape is divided into two categories.<sup>519</sup> This legislative discretion has been highly criticised since it has permitted judges to employ rape myths and stereotypes to justify variations from the stipulated minimum penalties.<sup>520</sup> Some judges focus on characteristics that warrant a shorter sentence rather than those that make rape a serious crime, regularly finding ‘excuses’ for offenders in the sentences they impose, excuses that correspond with widely held rape myths and stereotypes.<sup>521</sup>

Stewart et.al argues that people in various positions within a social system draw on certain myths and stereotypes in the same way and to the same extent, given that these notions are so ingrained in our reality.<sup>522</sup> These include rape myths and stereotypes, serving as an example of how all members of society, including judges, ‘rely on the same taken-for-granted explanations and assumptions about reality’.<sup>523</sup> These beliefs are notably prevalent in the South African setting, and early cases involving the application of minimum-sentencing legislation demonstrate a reliance on these misconceptions and stereotypes.<sup>524</sup> This was evident in *S v Mahomotsa*, where the court noted:

Although there was intercourse with each complainant more than once, this was the result of the virility of a young man still at school who had intercourse with other school pupils against their wishes, and note, school pupils who had previously been sexually active. . . . Where one is

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<sup>516</sup> Spies op cit note 514 at 392.

<sup>517</sup> *S v Dodo* 2001 (1) SACR 594 (CC).

<sup>518</sup> Spies op cit note 514 at 393.

<sup>519</sup> ‘The first is a part one offence that carries a life sentence if the victim was raped more than once or the offender committed gang rape; if the offender has been convicted of two or more rape or compelled rape offences but has yet to be sentenced in respect of such convictions; if the offender committed rape knowing he was HIV positive; or if the victim was younger than sixteen, disabled, or severely injured. The second, a part three offence, comprises all rapes other than those in part one and calls for a ten-year penalty for a first offender, a fifteen-year sentence for a second offender, and a twenty-year term for a third or subsequent offender. If there are strong and compelling reasons to impose a shorter sentence, the judicial officer may consider decreasing the required term’.

See Spies op cit note 514 at 394.

<sup>520</sup> Ibid.

<sup>521</sup> Ibid.

<sup>522</sup> Ibid.

<sup>523</sup> Ibid.

<sup>524</sup> Ibid.

dealing with school pupils, and where, in addition, it appears that the two girls concerned had already had intercourse before, one really shouldn't lose perspective, especially not in relation to the first count, which dealt with a complainant who had in any event been naughty a few days earlier and had intercourse with someone else. The injustice which she suffered, in this case, does not demand an usually severe sentence.<sup>525</sup>

Despite the Supreme Court of Appeal ('SCA') overturning the judgment, it demonstrates that rape myths can and do impact judicial reasoning.<sup>526</sup> Equally troubling was the early decision in *S v Abrahams*, in which a father who raped his daughter was not considered a menace to society, justifying a departure from the prescribed sentence.<sup>527</sup> The court nonetheless found strong and compelling grounds not to impose the minimum sentence, notwithstanding the SCA's efforts to emphasise that rape within a family is just as horrific as rape outside the family.<sup>528</sup> In this case, the victim's absence of physical harm was especially persuasive in this decision.<sup>529</sup>

In *Motaung*, the fact that the victim was in a tavern when she was raped weighed strongly against her in the sentencing of her rape.<sup>530</sup> The court identified a key mitigating circumstance, reasoning that: 'there was a reasonable basis for his opinion that the victim was older than 13 because she was playing pool in the bar until late Saturday night'.<sup>531</sup> A young woman in a tavern late at night defies the stereotype of 'good girls' and respectable daughters.<sup>532</sup> It implies that poor, Black, township-dwelling girls are sexually mature at such a young age that they should be regarded as adults.<sup>533</sup> This stems from the hyper-sexualisation of Black women and girls. Smythe argues that these attitudes are commonly held within the criminal justice system.<sup>534</sup> By highlighting these specific verdicts, I intend to convey the idea that the judiciary is not immune to perpetuating rape myths, particularly that of the unrapeable Black woman. These views discriminate against Black rape complainants and violate our constitutionally protected right to equal treatment in the eyes of the law.

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<sup>525</sup> Spies op cit note 514 at 395

<sup>526</sup> Ibid.

<sup>527</sup> Ibid.

<sup>528</sup> Ibid.

<sup>529</sup> Ibid.

<sup>530</sup> Rebecca Chennells 'Sentencing: The "Real Rape" Myth' (2009) 82 *Empowering Women For Gender Equity*.

<sup>531</sup> Ibid.

<sup>532</sup> Ibid.

<sup>533</sup> Ibid.

<sup>534</sup> Smythe op cit note at 57.

The South African criminal justice system has failed Black women in the punishment of rape offenders not because it has failed to protect women from sexual violence, but because it aids in perpetuating and tolerating this violence.<sup>535</sup> This sentiment is echoed by Clover who states:

Interpretations in law also constitute justifications for violence which has already occurred, or which is about to occur. When interpreters have finished their work, they frequently leave behind victims whose lives have been torn apart by these organized, social practices of violence.<sup>536</sup>

Therefore, the link between legal interpretation and violence is activated when judges subscribe to and employ rape myths in reaching their final verdicts.<sup>537</sup> By maintaining and perpetuating racist and sexist standards, the justice system finds itself entrenching rape myths which further impede the passage of transformational legislation and exacerbate inequality.<sup>538</sup> This also obstructs access to justice for Black rape victims because the acceptance of rape myths impedes the administration of justice, constituting a gross human rights violation, as access to justice is essential to the realisation of all other constitutionally guaranteed rights.<sup>539</sup>

#### **(f) Conclusion**

Throughout this chapter, I have demonstrated how rape in South Africa is a complex issue, exacerbated in part by racially charged perceptions, cruel patriarchal restrictions, and the corrosive effects of apartheid and colonialism.<sup>540</sup> The bloody legacies of slavery, colonialism, and apartheid cannot be erased by this ‘transition’ to a democratic government.<sup>541</sup> Therefore, the chains of colonialism and apartheid have enslaved South Africa.<sup>542</sup> Lingering remnants of colonial and apartheid ideologies, such as racial prejudices, permeate our communities,

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<sup>535</sup> Modiri, Joel M ‘The Rhetoric of Rape: An Extended Note on Apologism, Depoliticisation and the Male Gaze in *Ndou v S*’ (2014) 30 *South African Journal on Human Rights*

<sup>536</sup> Robert M. Cover ‘Violence and the Word’ (1986) 95 *The Yale Law Journal* 1601.

<sup>537</sup> Modiri op cit note 535.

<sup>538</sup> Ibid.

<sup>539</sup> In South Africa, the Constitution ensures that individuals have access to justice, equal opportunities to appear before a court, and the right to a fair trial. Explicit provisions regarding these rights are outlined in Section 34, which guarantees the right to a fair public hearing in a court or, when suitable, before another independent and impartial body or venue for the resolution of legal matters.

<sup>540</sup> Azaliah Mapombere *Sexual Violence against Women in South Africa: The Social Climate Surrounding Rape and the Position of the Internal Protection System* (Master’s thesis in Advanced European and International Studies, Anglophone Branch, 2010-2011) at 4.

<sup>541</sup> MTV Base Africa ‘The People vs The Rainbow Nation’, available at [https://www.youtube.com/watch?v=Yu-1Wlo5\\_Hs&ab\\_channel=MTVBaseAfrica](https://www.youtube.com/watch?v=Yu-1Wlo5_Hs&ab_channel=MTVBaseAfrica), accessed 18 April 2023.

<sup>542</sup> Thinandavha D Mashau ‘Unshackling the Chains of Coloniality: Reimagining Decoloniality, Africanisation and Reformation for a Non-racial South Africa’ (2018) 74(3) *HTS Teologiese Studies/ Theological Studies* 4920.

extending to the criminal justice system.<sup>543</sup> Therefore, embedded in the fabric of South African society are racism and sexism, reflective of decades marked by racial and sexist segregation, oppression, exploitation, propaganda, racist systems, and attitudes.<sup>544</sup> The colonial construction of the ‘unrapeable Black woman’ has meant that, as Black women, we are perceived as sexual beings from childhood, deviating from normative experiences due to hyper-sexualisation.<sup>545</sup> Black women have been targets of sexual violence throughout history and into the present day, yet our victimisation remains largely overlooked. As Black women, we are always at risk of having our dignity and humanity violated by a stranger, our lovers, our friends, our pastors, our teachers, our *malumes*,<sup>546</sup> and yet we will struggle to gain credibility in the eyes of the justice system because we are believed to cry wolf.<sup>547</sup> Ours is a cry that no one hears. Thereby demonstrating that the societal response to our victimisation is still riddled with colonial ideals and the hyper-sexualisation of our bodies continues to impact our credibility as rape complainants. The visible effects of colonialism and apartheid linger on the surface of South African society today.

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<sup>543</sup> Mashau op cit note 542.

<sup>544</sup> Ibid.

<sup>545</sup> Toni Irving ‘Decoding Black Women: Policing Practices and Rape Prosecution on the Streets of Philadelphia’ (2008) 20(2) *National Women’s Studies Association Journal* 107.

<sup>546</sup> The term ‘malume’ is of Zulu origin and means uncle and usually refers to the maternal uncle.

<sup>547</sup> Albanie op cit note 3 at 1.

## V. CONCLUSION

As women, we live in the midst of a society that regards us as contemptible. We are despised, as a gender class, as sluts and liars. We are the victims of continuous, malevolent, and sanctioned violence against us - against our bodies and our whole lives. Our characters are defamed, as a gender class, so that no individual woman has any credibility before the law or in society at large. Our enemies - rapists and their defenders - not only go unpunished; they remain influential arbiters of morality; they have high and esteemed places in the society; they are priests, lawyers, judges, lawmakers, politicians, doctors, artists, corporation executives, psychiatrists, and teachers.<sup>548</sup>

According to Catharine Mackinnon, a comprehensive understanding of rape requires recognising that it is committed against those with less social power, with gender serving as the most obvious marker of stratification.<sup>549</sup> It is essential to comprehend social differences and power to fully understand rape.<sup>550</sup> In societies that adopt repressive and damaging standards regarding race, class, gender, etc., those who face marginalisation due to these norms have less power.<sup>551</sup> Consequently, violence against them is not only condoned but also socially acceptable.<sup>552</sup> Those with greater access to power consider marginalised groups as less credible and more accessible; this sense of entitlement and authority enables one group to objectify and abuse others.<sup>553</sup> As a result, sexual violence becomes condoned, normalised, and socially sanctioned, and the oppressed population is frequently held accountable for the violence perpetrated against them.<sup>554</sup> While a patriarchal society, to some extent, reduces all women to sexual commodities, as Black women, we are subjected to the cumulative historical consequences of race, class, and gender, all of which contribute to our ongoing sexual debasement.<sup>555</sup>

As noted by Zwane, both white and Black women can relate to experiences of gender and class oppression, including those of sexual violence.<sup>556</sup> However, there are gendered experiences that are specific to Black women and occur because we are Black women.<sup>557</sup> As

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<sup>548</sup> Andrea Dworkin *Our Blood: Prophecies and Discourses on Sexual Politics* (1976).

<sup>549</sup> Catharine A Mackinnon *Women's Lives, Men's Laws* (2005) 241.

<sup>550</sup> Ibid.

<sup>551</sup> Ibid.

<sup>552</sup> Alison Fields 'The Roots Of Sexual Violence As A Tool For Oppression' *Anti-Racism Daily* 2022, available at <https://the-ard.com/2022/04/28/how-sexual-violence-became-a-tool-for-oppression/>, accessed 8 November 2022.

<sup>553</sup> Ibid.

<sup>554</sup> Ibid.

<sup>555</sup> Holmes op cit note 107.

<sup>556</sup> Zwane op cit note 36.

<sup>557</sup> Ibid.

Black women we are commonly believed to possess heightened sexuality and are often presumed to be untruthful or unreliable, fostering the belief that we are unrapeable due to colonial discourses surrounding Black femininity.<sup>558</sup> The colonial logic of subhuman sexual categorisation, labelling the Black woman as unrapeable and the Black man as an essential or natural rapist, deeply permeates the ongoing colonial endeavour of racialising the indigenus.<sup>559</sup> This study sought to understand these ideals, drawing insights from scholars such as Oyěwùmí, Lugones, and Gqola, who provide detailed explanations of how the formation of the settler-native divide, as well as the colonial re-construction of the ‘native world,’ forcefully and efficiently employed the logic of sexualisation at the core of European theoretical order and subject creation.<sup>560</sup> One of the most significant features of the colony is the sexual wound at the root of ‘racial-colonial denigration and exploitation’, which largely explains the abjection of the racialised body.<sup>561</sup> The process of colonial subjectification (and dehumanisation) continues and is constantly reproduced in modernity, although it is often erased, disguised, and ignored.<sup>562</sup> Therefore, the ongoing devaluation of Black womanhood and the disbelief in our experience of rape are the result of historic sexual exploitation and a repetition of colonial patterns.<sup>563</sup>

Throughout this thesis, I have explored the challenges faced by Black rape complainants in establishing credibility within the criminal justice system due to the racist and sexist colonial psyche that labelled us as unrapeable. Utilising my personal experience as a rape complainant, I aimed to demonstrate the institutional violence Black women face at the hands of the criminal justice system, explaining how our experiences of rape are often greeted with scepticism. The discrimination encountered by Black complainants represents a stain on the commitment to equal protection under the law.<sup>564</sup> Despite efforts made through rape laws and state interventions to enhance reporting rates, Black women continue to face victimisation within the criminal justice system.<sup>565</sup> Modiri contends that the formal cessation of legally sanctioned racial discrimination should not be confused with the abolition of coloniality and

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<sup>558</sup> Linda Adeniji ‘The Unrapeable Black woman: How the Lack of Legal Protection Through the Centuries Promoted the Tradition of Unreported Sexual Assaults’ (2015) *Available at SSRN 2702861* 4.

<sup>559</sup> Coetzee and Du Toit op cit note 89 at 11.

<sup>560</sup> Ibid.

<sup>561</sup> Ibid.

<sup>562</sup> Lugones op cit note 94.

<sup>563</sup> Adeniji op cit note 558.

<sup>564</sup> Ibid.

<sup>565</sup> Ibid.

white supremacist structures, practices, and connections.<sup>566</sup> Consequently, the criminal justice system still harbours settler-colonial attitudes and beliefs through systems that perpetuate inequities amongst Black people and other marginalised communities.<sup>567</sup> The criminal justice system clings to colonial ideals of the unrapeable Black woman, influencing the societal response to our victimisation and denying us legal recourse. Therefore, the scars of dehumanisation were not effectively addressed with the transition to democracy. As a result, reforms and state interventions are no more effective than placing a plaster on a severed ligament.<sup>568</sup>

### *Liberation for Black Women*

As noted by Modiri and contended in this study, the blind spot of race and gender discourse, grounded in human rights and equality, insists that whites and blacks, men and women, now enjoy equal formal legal rights since 1994, marking the *de jure* end of apartheid.<sup>569</sup> The law, operating under the principle of all races or colour blindness, can only identify overt and blatant racist behaviours, not those that are comparatively ‘indirect, subtle, or systemic’.<sup>570</sup> While the term ‘equality’ may be aesthetically pleasing and serves as excellent political rhetoric, the majority of Black women recognise that ‘gender and racial equality’ is a pipe dream that must be deconstructed.<sup>571</sup> For us, equality is an abstract alien concept with little relevance in the actual world, as those who promote it in the name of human rights selectively use it, even for political purposes.<sup>572</sup> Realistically, the most significant merit still lies in having white skin, a male sexual organ, and speaking English or Afrikaans.<sup>573</sup> This is a result of our current political lens, which is filled with colonial ideals and slave history, promoting white male supremacy.<sup>574</sup> Black women are not viewed as having full political agency and thus are considered subhuman.<sup>575</sup>

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<sup>566</sup> Joel M Modiri ‘The Colour of Law, Power and Knowledge: Introducing Critical Race Theory in (post-) apartheid South Africa’ (2012) 28(3) *South African Journal on Human Rights* 405-436.

<sup>567</sup> Noor Shawush ‘Decolonization and Justice: An Introductory Overview’ (2022), available at <https://opentextbooks.uregina.ca/decolonizingjustice/chapter/chapter-1/>, accessed 12 June 2023.

<sup>568</sup> Adeniji op cit note 558.

<sup>569</sup> Modiri op cit note 566.

<sup>570</sup> Ibid.

<sup>571</sup> Tamale op cit note 384 at 209.

<sup>572</sup> Ibid.

<sup>573</sup> Celina Romany ‘Black Women and Gender Equality in a New South Africa: Human Rights Law and the Intersection of Race and Gender’ (1996) 21(3) *Brooklyn Journal of International Law* 857-898.

<sup>574</sup> Ibid.

<sup>575</sup> Albanie op cit note 383.

Modiri further contends that over time South Africa's constitutional democracy has been rendered worthless due to the absence of tangible historical justice and the failure to realise an 'an emancipatory experience of freedom and dignity in the lives of the country's Black majority'.<sup>576</sup> According to Modiri, the Constitution is a vehicle for maintaining the same colonial-apartheid power structures, value systems, and subjectivities that gave rise to it.<sup>577</sup> How else can we account for the advent of constitutional democracy in South Africa, which has had little effect on white supremacy and colonialism?<sup>578</sup> Which rights and privileges does the Constitution preserve, and which rights and privileges does it deny, limit, or do away with?<sup>579</sup> Thus, this nationwide 'rainbowism' perspective has numerous problems.<sup>580</sup> It emphasises multiculturalism's palatable features from the perspective of a white minority.<sup>581</sup> Also, it rejects any initiatives to deal with systemic injustice.<sup>582</sup> As a result, Black women's accounts of being oppressed are delegitimised and ignored.<sup>583</sup> Constitutions are often seen as the primary tools for producing and rebuilding a political community after conflict.<sup>584</sup> However, as Stacy Douglas argues in her piece titled 'Constitutions Are Not Enough', this view usually comes at the expense of other possible visions of the political community.<sup>585</sup> It ignores the pervasiveness of unfairness and the complex realities of subjectivities.<sup>586</sup> The past is no longer seen as a period that can be reclaimed.<sup>587</sup> Emancipation has given way to accommodation, and reconciliation has replaced revolution as the vocabulary of social and political transformation in our period of liberalism and liberalisation, with the future echoing the present.<sup>588</sup>

### *A Case for Decolonisation*

In the words of Audre Lorde, 'the master's tools will never dismantle the master's house'.<sup>589</sup> Therefore, this thesis concludes that, due to the fundamental nature of coloniality, a

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<sup>576</sup> Modiri op cit note 86.

<sup>577</sup> Ibid.

<sup>578</sup> Ibid.

<sup>579</sup> Ibid.

<sup>580</sup> Ibid.

<sup>581</sup> Ibid.

<sup>582</sup> Ibid.

<sup>583</sup> Ibid.

<sup>584</sup> Ibid.

<sup>585</sup> Ibid.

<sup>586</sup> Ibid.

<sup>587</sup> Ibid.

<sup>588</sup> Ibid.

<sup>589</sup> Audre Lorde 'The Master's Tools Will Never Dismantle the Master's House' (2003) *Feminist Postcolonial Theory: A Reader* 25.

decolonisation endeavour must be undertaken if coloniality and the epistemic injustice it upholds are to be undone.<sup>590</sup> According to Tamale, decolonisation refers to various processes that dismantle colonial interpretations and analyses of the social world, and it is in line with Frantz Fanon's viewpoint in *The Wretched of the Earth*.<sup>591</sup> She further adds that: 'for the colonized, decolonization of the mind is really about returning to the annals of history to find ourselves, to become fluent in our cultural knowledge systems, to cultivate critical consciousness and to reclaim our humanity'.<sup>592</sup> Similar to Mack and Na'puti, I contend that researchers should engage in decolonial feminist critique, and addressing gendered and sexual violence within settler colonial nations necessitates a commitment to decolonisation.<sup>593</sup> To comprehend the complex and multifaceted expressions of sexual violence across racial, gender, and sexuality-based lines within the context of colonialism and disenfranchisement, rhetorical and cultural scholars should consider such approaches.<sup>594</sup> Modiri contends that 'colonial ignorance' is primarily manifested by the denial, dissociation, and normalisation of the history and horrors of colonialism, sexual violence, white dominance, and racism.<sup>595</sup>

Colonial ignorance normalises a white hegemony in South Africa, denies historical justice to colonised people, and frames the realm of sense, knowledge, perception, and imagination in a manner that renders real decolonisation seemingly absurd and unachievable.<sup>596</sup> Therefore, a commitment to decolonisation within analytical practice actively strives to dismantle ongoing power relations in settler colonial contexts, going beyond merely acknowledging the harm stemming from colonial legacies.<sup>597</sup> From a decolonial feminist perspective, gendered violence, such as rape, is recognised as a part of colonial violence and pays attention to modernity's processes of racialisation, gender dichotomisation, and heterosexualism.<sup>598</sup> Examining sexual and gendered violence through this lens also necessitates fighting the replication of colonial logic through engagement with dissenting modes of

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<sup>590</sup> Lilandi Niemand 'Moving Beyond The Abyssal Line: The Possibility Of Epistemic Justice In The 'Post' - Apartheid Constitutionalism' (2022) 16 *Pretoria Student Law Review* 218.

<sup>591</sup> Tamale op cit note 384.

<sup>592</sup> Ibid.

<sup>593</sup> Decolonisation takes many forms and has been traditionally thought as merely unshackling of the political constraints of Western colonial system however an uncritical transition to customary law/practices does not suffice as a comprehensive manifestation of decolonisation.

Mack & Na'puti op cit note 109.

<sup>594</sup> Ibid.

<sup>595</sup> Modiri op cit note 86.

<sup>596</sup> Ibid.

<sup>597</sup> Mack & Na'puti op cit note 109.

<sup>598</sup> Ibid.

knowledge and being.<sup>599</sup> For Coetzee and Du Toit, decolonial theory believes in the subaltern's power to radically disrupt colonial discourses and provide room for alternative worldviews.<sup>600</sup> Therefore, to eradicate sexual violence against Black women in South Africa, the colonial remains of gender and racial structure must be completely dismantled.<sup>601</sup> It should be noted that colonial sexual violence has engendered the fears and anxieties, as well as the aims and objectives, that underpin this pervasive violence, with disastrous consequences for all Black women, both in contemporary and during the colonial era.<sup>602</sup> Therefore, the liberation of Black women from the chains of coloniality and the removal of the barriers they face are essential for realising a truly free South Africa. However, it is important to acknowledge that the discussion on how to decolonise Black femininity, as well as the criminal justice system, exceeds the scope of this thesis and should be explored in future research.

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<sup>599</sup> Mack & Na'puti op cit note 109.

<sup>600</sup> Coetzee and Du Toit op cit note 89 at 11.

<sup>601</sup> Ibid.

<sup>602</sup> Ibid.

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